TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 625.

JAMES W. McCREADY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED APRIL 14, 1876.

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1 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at Richmond on Thursday, the seventeenth day of February, in the year one thousand eight hundred and seventy-six.

Be it remembered that heretofore, to wit, at a supreme court of appeals of Virginia, held at Richmond, on the 1 day of December, 1875, upon the petition of James W. McCready, a writ of supersedeas was awarded him to a judgment rendered by the circuit court of Gloucester County, on the 15th day of October, 1875, upon an indictment the Commonwealth of Virginia against him for a misdemeanor, whereby it was considered that a judgment rendered by the county court of said county, on the 5th day of July, 1875, on said indictment be affirmed with costs, upon the petitioner, or some one for him, entering into bond
2 with good security in the clerk's office of the said circuit court in the penalty of eight hundred dollars, with condition as prescribed by the Code of Virginia, edition of 1873, chapter 178, section 13, in a case in which a supersedeas is awarded.

The petition before referred to and the record accompanying the same, are in the words and figures following, to wit:

3 In the supreme court of appeals of Virginia, Richmond.

MCCREADY
vs.
COMMONWEALTH.

To the honorable judges of the supreme court of appeals of Virginia:

Your petitioner, James W. McCready, respectfully represents that he is aggrieved by a judgment of the circuit court of Gloucester County, rendered on the fifteenth day of October, 1875, on an indictment there pending against him.

It will appear from the transcript of the record herewith presented, that your petitioner was indicted at the October term of the circuit court, 1874, for planting oysters in Ware River, in said county, on the first of September, 1874, he "being then and there other than a citizen of this State." On the 9th of November, 1874, a summons was issued by John S. Cook, who was clerk of both circuit and county courts, to your petitioner to appear before the judge of the county court of said county at the first day of the December term to answer said indictment. This summons was returned executed, but your petitioner did not appear. The case was continued at that and the next quarterly term. At the July term, 1875, without any other process having been issued, and without any appearance by your petitioner, a jury was empannelled to try the case, who returned a verdict of guilty against your petitioner, and assessed his fine at $500. A judgment at the same time was entered upon the said verdict and for costs. A supersedeas to the judgment of the county court was granted by the judge of the circuit court of Gloucester County, and upon a hearing of the same on the 15th day of October, 1875, the judgment of the county court was affirmed.

This indictment was founded on the 22nd section of the act in relation to oysters, passed April 18th, 1874. The 22nd section declares
4 that "if any person other than a citizen of this State shall take or catch oysters or any shell-fish in any manner, or plant oysters in the waters thereof, or in the rivers Potomac or Pocomoke, he shall forfeit five hundred dollars, and the vessel, tackle, and appurtenances."

Your petitioner assigns the following errors in said judgment:

1. The indictment was found in the circuit court of Gloucester County. He was tried in the county court of the said county. It does not appear that any copy of the indictment was certified by the clerk of the circuit court to the county court as is required by law. (See Sessions Acts for 1874, page 160, sec. 16.) The county court could have no jurisdiction of the case until it had been duly certified to it by the clerk of the court wherein the indictment was found.

2. The jury assessed the fine, though the same was fixed by law. By the provisions of the Code, chap. 41, sec. 3, page 394, and by chap. 195, sec. 24, page 1209, the jury has only the right to assessa fine when the amount is not fixed by law. When it is fixed by law it becomes part of the judgment of the court. It is true that the fine as assessed by the jury is the same as that mentioned in the law, and the same as that named in the judgment of the court; but non constat but that the assessment by the jury determined and controlled the judgment of the court. Such would appear to have been the case from the record. It runs, "Therefore it is considered by the court that the Commonwealth recover against the said defendant the sum of five hundred dollars, the fine assessed as aforesaid." If the assessment of the fine in the verdict be regarded as surplusage, and therefore stricken out, we have then a judgment which is not supported by the record. The judgment is based upon the assessment and not upon that part of the verdict which found your petitioner guilty.

3. It will be observed that the section under which this indictment was found imposes a penalty only upon such persons as are not citizens of Virginia. Nowhere in this law, which seems to supersede all other laws on the subject, or in any other law, is there any penalty upon a citizen of Virginia for planting oysters. This case then fairly raises the question whether such State legislation as imposes a penalty upon citizens of other States, for the act of planting oysters within the waters of this State, and at the same time gives complete immunity to the citizens of this State in the same regard, is to be deemed to be in derrogation of the provisions of the Federal Constitution.

The tide ebbs and flows in Ware River. Is such legislation in derrogation of the exclusive right of Congress to regulate commerce? Is it in derrogation of the constitutional provision that "the citizens of each State shall be entitled to the privileges and immunities of citizens in the several States?" Is it in derrogation of the fourteenth amendment, which seems to contain ampler provisions on the same subject?

Clearly under this law of April, 1874, the citizens of Virginia have immunities which are not given to citizens of other States. They are free from penalties which are imposed upon the citizens of any other State. And this, too, by virtue of citizenship alone. The immunity belongs to every citizen of Virginia, and the penalty to the citizen of every other State. This legislation, therefore, is clearly against the letter of the Federal provision, and, as your petitioner is informed and believes, equally against its spirit. Any business within the limits of Virginia which is lawful to her own citizens, or as to which there is no penalty provided by law so far as they are concerned, is made lawful and without penalty by the Federal Constitution to the citizens of every other State. It may be that Virginia may prescribe limitations and conditions to the prosecution of any business, other than that of citizenship; it may be that she may restrict the conduct of such business to a certain class having certain qualifications; but when it is opened to all her people by virtue of their citizenship, the

same privilege attaches to the citizens of other States. What other meaning than that claimed can attach to the word "immunity" in the Federal Constitution? It surely must mean that if no penalty is imposed upon a citizen of Virginia for doing a certain thing, such for instance as planting oysters, no penalty can be lawfully imposed upon a citizen of a sister State. It has been frequently decided that the constitutional provision exempts a citizen of one State from higher taxes and impositions than are imposed upon the citizen of the other State. If that be so, will it not exempt from complete prohibition or an onerous penalty not imposed upon the home citizen? Mr. Justice Field (Paul vs. Virginia, 8 Wall., 180) says: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them; it insures to *to* them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws."

To the same effect is the decision of the U. S. Supreme Court in Ward vs. State of Maryland, 12 Wallace, 418. The decisions on this subject are grouped in Cooley's edition of Story's Commentaries, 2d vol., pages 558 to 564, and 650 to 658.

This legislation is also in conflict with the constitutional provision which gives to Congress the power to regulate commerce among the several States. It not only prohibits a citizen of Maryland from planting oysters taken from the waters of this State, but oysters brought
6 within the State from other States. The indictment is silent as to whether the oysters planted were a domestic product or brought from another State. In favor of innocence, if necessary, your petitioner can claim what is not denied in the indictment, that the oysters were not the domestic product of this State, but a legitimate subject of inter-State commerce. Congress has secured to the public the free and unobstructed use of the navigable waters of this State. These waters are free to commerce and to every subject of commerce, as oysters undoubtedly are. How that commerce is to be regulated or controlled is a matter of Federal and not State cognizance, except so far as mere police regulations are concerned. This legislation does not pretend or purport to be a police regulation. The fact that it is allowed to citizens without restriction is conclusive on that head. This legislation is nothing less than a regulation of inter-State commerce and traffic. Judge Story says "that the terms of the Constitution have at all times been understood to include a power over navigation, as well as trade; over intercourse, as well as traffic; and that in the practice of other countries, and especially in our own, there has been no diversity of judgment or opinion." (Cooley's edition of Story's Commentaries, 2 vol., sec. 1065, page 7.)

The public has a right under congressional enactments to use the navigable waters of Virginia for every purpose of lawful traffic, trade, or business, one of which is the planting of oysters.

Oysters are improved by planting, just as whiskey is improved by storage. What would be thought of a law which gave the privilege of storage to citizens of Virginia, but denied it to citizens of other States?

Such a law, besides being subject to other objections, would be a usurpation of the congressional power to regulate commerce. The only pos-

sible justification of such legislation would be that it was a proper exercise of the reserved police or sanitary powers of the State; and they must always be equal.

On the general subject, see Cooley's edition of Story's Commentaries, 2 vol., from page 2 to 23. See, also, 8 Cushing, 347, which sustains the right of the public independent of the Federal law.

For these and other reasons apparent on the record, your petitioner respectfully prays a writ of error and supersedeas.

JAMES W. McCREADY,
By OULD & CARRINGTON,
His Counsel.

We, Ould & Carrington, counsel practicing in the supreme court of appeals of Virginia, do hereby certify that in our opinion there is error in the aforesaid judgment of the circuit court of Gloucester County, and that the same ought to be reviewed and reversed.

OULD & CARRINGTON.

NOV. 25, 1875.

7 VIRGINIA:

At a circuit court, continued and held for Gloucester County, at the court-house, on Friday, the fifteenth day of October, one thousand eight hundred and seventy-five. Among the records and proceedings of the said court is the following case, to wit:

THE COMMONWEALTH
against
JAMES W. McCREADY.

Petition.

The petition of J. W. McCready represents that he is aggrieved by a judgment of the circuit court of Gloucester County, rendered on the 5th day of July, 1875, against him in a prosecution in the name of the Commonwealth of Virginia against your petitioner, being then and there other than a citizen of this State, for unlawfully planting oysters in the waters of Virginia. A transcript of the record of the said case is herewith presented, from which it will appear that the case is as follows:

At the fall term, 1874, of the circuit court of Gloucester County, an indictment was found by the grand jury then attending the *the* said court against your petitioner, that he, being other than a citizen of this State, did unlawfully, on the 1st day of September, 1874, plant oysters in the waters of this State. On the 9th of November, 1874, a summons was issued by John S. Cooke, the clerk of the said circuit court, who at the same time was clerk of the county court of said county, to your petitioner to appear before the judge of the county court of the said county at the first day of the December term next after the date of said summons to answer the said indictment. This summons was returned executed, but your petitioner did not appear.

At the December term of the said county court the case was continued, and at the next quarterly term, April, 1875, it was again continued. At the July term, 1875, without any other process having been issued and without any appearance by your petitioner, a jury was empannelled to try the said case, who returned a verdict of guilty against your petitioner, and assessed his fine at $500. A judgment at

the same term was entered upon the said verdict, and the costs of suit.

An execution has been sued out of the clerk's office of the said
8 circuit court against the goods of your petitioner, which came to the hands of Junius B. Browne, sheriff of the said county, and by him has been levied on the property of your petitioner.

Your petitioner assigns the following error in the said judgment:

First. The indictment was found in the circuit court of Gloucester County; no copy of the indictment was certified by the clerk to the county court. The county court could not take cognizance of or prosecute the case until it had been duly certified to it by the clerk of the circuit court, the judgment against your petitioner was by default, and this error is not cured. (See Acts of 1874, p. 160, § 16.)

Second. The case was tried when only one summons had issued against your petitioner, and no other process had issued. Your petitioner had never appeared, either in person or by counsel, and the judgment so rendered was erroneous. The 16th section of the same act also provides that in case of a misdemeanor, where no infamous or corporal punishment is inflicted, process shall in the first instance be a summons, but if the summons be 'turned executed or not found a capias may issue.

Third. The fine was fixed by law for the offence with which your petitioner was charged and the jury had no authority to assess the fine. They did assess it, however, and the judgment was entered for the fine so assessed.

Fourth. By the second section of the fourth article of the Constitution of the United States your petitioner, being a citizen of the State of Maryland, is entitled to all the privileges and immunities possessed and enjoyed by the citizens of Virginia in the waters of Virginia, and this right is again declared and guaranteed by the first section of the 14th amendment to the Constitution. Any enactment of the legislature of Virginia to deprive your petitioner of a right granted or secured to him by the Constitution of the United States, or which if enforced would have such effect, is of no effect.

For these and other reasons apparent on the face of the record of the case, your petitioner prays a writ of error and supersedeas to the said judgment.

J. W. McCREADY,
By M. B. SEAWELL, *his Att'y.*

I, M. B. Seawell, an attorney practicing in the circuit court of Gloucester County, do hereby certify that, in my opinion, the decision of the county court of Gloucester County in the case mentioned in the within petition should be reviewed by the said circuit court.

M. B. SEAWELL, *Att'y.*

9 Record referred to in the foregoing petition.

At a county court held for the county of Gloucester, at the courthouse, on Monday, the fifth day of July, one thousand eight hundred and seventy-five.

Among the records of the said court is the following case:

NINTH JUDICIAL CIRCUIT, GLOUCESTER COUNTY, *to wit:*

In the circuit court of the said county.

The jurors of the Commonwealth of Virginia, in and for the body of the county of Gloucester, now attending the said court, upon their oaths present that J. W. McCready, on the first day of September, 1874, in the said

county, and within the jurisdiction of this court, he, the said J. W. McCready, being then and there other than a citizen of this State, did unlawfully plant oysters in the waters thereof, to wit, in Ware River, against the peace and dignity of the Commonwealth of Virginia, upon the evidence of Richard C. Byrd, sworn in court, and sent to the grand jury.

Summons to answer.

The Commonwealth of Virginia to the sheriff of Gloucester County, greeting:

We command you to summon J. W. McCready to appear before the judge of our county court of Gloucester, at the court-house, on the first day of December term next, to answer an indictment of the grand jury made against him at October term last, of the circuit court of said county, for this, to wit: "That he, the said J. W. McCready, on the first day of September, 1874, in the said county, and within the jurisdiction of this court, he, the said J. W. McCready, being then and there other than a citizen of this State, did unlawfully plant oysters thereof, to wit, in Ware River, against the statute in that case made and provided, and against our peace and dignity." And have then and there this writ.

Witness John S. Cooke, clerk of our said court, this 9th day of November, 1874, in the 99th year of the Commonwealth.

10 *Sheriff's return.*

Executed by delivering a copy to J. McCready in person, on the 21st day of November, 1874.

J. B. BROWNE, *S. G. C.*

And at another day, to wit, at a court held for the county aforesaid, at the court house, on Saturday, the 12th day of December, 1874.

THE COMMONWEALTH *against* J. W. MCCREADY. } Upon an indictment of the grand jury.

This case is continued until the next term.

And at another day, to wit, at a court continued and held for the county aforesaid, at the court-house, on Wednesday, the 14th day of April, 1875.

THE COMMONWEALTH *against* J. W. MCCREADY. } Upon an indictment of the grand jury.

This case is continued for the defendant until the next term.

And now at this day, to wit, at a county court held for the county aforesaid, at the court-house, on Monday, the 5th day of July, 1875, being the same day and year first aforesaid.

THE COMMONWEALTH *against* J. W. MCCREADY. } Upon an indictment of the grand jury, for unlawfully planting oysters in Ware River on the 1st day of September, 1874, the said J. W. McCready being other than a resident citizen of this State.

This day came the attorney prosecuting for the Commonwealth, and the defendant not appearing, the plea of not guilty was entered by the

court, and issue being joined, thereupon came a jury, to wit,
11 Charles E. Allard, Wm. R. Leavitt, H. T. Sears, Thos. Harwood, Jas. T. Gray, Thos. M. P. Fary, Smith W. Brown, A. Wright, Alexander Pointer, Thos. C. Chapman, Jas. R. Bridges, and Nat. B. Leigh, who, being elected, tried, and sworn the truth to speak upon the issue joined, retired to their room to consult of their verdict; and after some time returned into court and brought in a verdict in the words and figures following, to wit:

"We, the jury, find the defendant guilty, and assess his fine at five hundred dollars.

"A. W. WRIGHT, *Foreman.*"

Thereupon it is considered by the court that the Commonwealth recover against the said defendant the sum of five hundred dollars, the fine assessed as aforesaid, and also her costs by her about her suit in this behalf expended, and the said defendant may be taken, &c.

Execution.

The Commonwealth of Virginia to the sheriff of Gloucester County, greeting:

We command you that of the goods and chattles of J. W. McCready, late in your baliwick, you cause to made five hundred dollars, which the Commonwealth lately, in our county court of Gloucester, recovered against the said J. W. McCready, for a fine imposed upon him for planting oysters in the waters of Virginia contrary to law, he being a non-resident citizen; also twenty-three dollars and seventy-five cents, which to the said Commonwealth in the same court were adjudged for her costs by her about her suit in that behalf expended; whereof the said J. W. McCready is convict as appears to us of record; and that you have the same before the judge of our said county court, at the court-house, on the first Monday in October next, to render to the said Commonwealth of the fine and costs aforesaid, and have then there this writ.

Witness, John S. Cooke, clerk of our said court, at the court-house, this 26th day of July, 1875, in 100th year of the Commonwealth.

JNO. S. COOKE, *C. C.*

Came to hand on the 12th day of August, 1875, at 1 o'clock p. m.

J. B. BROWNE, *S. G. C.*

12 *Sheriff's return.*

Levied this execution on a lot of oysters on Conklin Bar, in North River, supposed to be a thousand bushels; 2 flat-boats, 1 oyster-house, five pr. oyster-tongs, 1 lot oysters on Caroline Bar, 1 lot oysters opposite to Waverly shanty, 1 skiff, 1 lot oysters in Ware River, on Ware Point shore, supposed to contain from 3,000 to 10,000 bushels, 1 boat and 1 shanty; which was advertised to be sold on the 16th September, 1875, and the sale was prevented by a supersedeas issued from the circuit court of Gloucester County.

J. B. BROWNE, *S. G. C.*

And now at this day, to wit, at a circuit court, continued and held for the county aforesaid, at the court-house, on Friday, the 15th day of October, one thousand eight hundred and seventy-five, being the same day and year first herein mentioned.

JAMES W. McCREADY, APPELLANT, *against* THE COMMONWEALTH, APPELLEE. } Upon a supersedeas to a judgment of the county court of Gloucester County.

This day came as well the plaintiff in error, by his attorney, as the Commonwealth, by her attorney; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion that there is no error in the said judgment. It is therefore considered by the court that the same be affirmed, and that the Commonwealth recover against the plaintiff in error her costs by her about her defence in this behalf expended.

STATE OF VIRGINIA,
Gloucester County, to wit:

I, John S. Cooke, clerk of the circuit court for the county aforesaid, in the State of Virginia, do certify that the foregoing is a true transcript of the record in the case of James W. McCready against the Commonwealth, lately decided in said court.

Given under my hand this 11th day of November, 1875.

JNO. S. COOKE, *C. C.*

Clerk's fee for this transcript, $2.50.

A copy—teste:

GEO. L. CHRISTIAN, *C. C.*

13 And at another day, to wit, at a supreme court of appeals of Virginia, held at Richmond on the 18 day of January, 1876, came as well the plaintiff in error, by his counsel, as the attorney-general on behalf the Commonwealth; and this cause, having been partly heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel, was continued till the morrow.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 20 day of January, 1876, this cause was further heard upon the transcript of the record of the judgment aforesaid, and continued until the morrow.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 21 day of January, 1876, this cause was further heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel, and continued until the morrow.

14 And at another day, to wit, at a supreme court of appeals of Virginia, held on the 22 day of January, 1876, this cause was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel; but because the court was not then advised of its judgment to be given in the premises, time was taken to consider thereof.

And now at this day, to wit, at a supreme court of appeals of Virginia, held at Richmond, on the same day and year first herein mentioned, to wit, Thursday, the 17 day of February, 1876.

JAMES W. McCREADY, PLAINTIFF, *against* THE COMMONWEALTH OF VIRGINIA. }

Upon a writ of supersedeas to a judgment rendered by the circuit court of Gloucester County, on the 15th day of October, 1875, affirming with costs a judgment rendered by the county court of said county on

the 5th day of July, 1875, in a prosecution by the Commonwealth against the plaintiff in error, for unlawfully planting oysters in Ware River on the 1st day of September, 1874, the said plaintiff in error being other than a resident of this State; whereby it was considered that the
15 Commonwealth recover against him five hundred dollars, and her costs by her in that behalf expended.

This day came again as well the plaintiff in error, by his counsel, as the attorney-general on behalf of the Commonwealth; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that there is no error in the said judgment. Therefore, it is considered that the same be affirmed, and that the Commonwealth recover against the said plaintiff in error damages according to law, and her costs by her about her defence in this behalf expended.

And at the instance of the counsel for the plaintiff in error, the court certifies that in the record, and at the hearing of this cause, there was drawn in question the validity of the 22nd section of the act of the general assembly of Virginia, approved April 18, 1874, entitled "An act for the preservation of oysters, and to obtain revenue for the privilege of taking them within the waters of this Commonwealth," on the ground that said section of said act is repugnant to section 2 of article
16 4, and section 8 of article 1 of the Constitution of the United States, and that the decision of this court is in favor of the validity of said section of said act, and against the title, right, and privilege set up and claimed under the said sections of said articles of said Constitution, as claimed by the said plaintiff in error, to plant oysters in the waters of this Commonwealth, he being a resident of the State of Maryland, and in opposition to said section of said act of the general assembly of Virginia.

Which is ordered to be certified to the said circuit court of Gloucester County.

17 The reasons, in writing, for the opinion of the court, as stated in the judgment preceding, are in the words and figures following:

Opinion.

McCready
v.
The Commonwealth of Virginia.

By an act of assembly approved April 18, 1874, (§ 22, chap. 214, p. 243, Sess. Acts 1874,) "If any person (other than a citizen of this State) shall take or catch oysters, or other shell-fish, in any manner, or plant oyster in the waters thereof" &c., "he shall forfeit $500, and the vessel, tackle, & appurtenances." This is an indictment against the plaintiff in error, who is other than a citizen of this State, for planting oysters in the waters thereof, to wit, in Ware River, in violation of s'd 22 section.

The prosecution is resisted upon the ground that the above section is an infringement of the Constitution of the United States, because it is contrary, first, to art. 4, section 2: "The citizens of each State
18 shall be entitled to all privileges & immunities of citizens of the several States;" and, second, to art. 1, section 8: "The Congress shall have power to regulate commerce with foreign nations & among the several States," &c.

It seems to be well settled that the States respectively are entitled to the navigable waters within their several territorial limits, including both the water & the land under the water. In Martin against Waddell, (16 Peters, 407,) Ch. J. Taney, speaking for a majority of the court, says: "We do not propose to meddle with the point as to the power of the king, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom; for when the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters & the soils under them for their own common use." As expressed by Ch. Justice Kirkpatrick of the supreme court of New Jersey, "The people of the State since the Revolution being invested with the regal rights as sovereign, and having themselves both the legal estate and the usufruct, may make such disposition of them, & such regulations
19 concerning them as they may think fit," "subject only," Ch. Justice Taney adds, "to the rights since surrendered by the Constitution to the General Government." We will after a while consider what they are.

In Smith v. State of Maryland, (18 How. U. S. Rep., p. 74,) it was held by the Supreme Court of the U. S., Mr. Justice Curtis delivering the opinion, "that whatever soil below low-water mark is the subject of exclusive propriety & ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the declaration of independence." He goes on further to say, "The State holds the property of the soil in some sense in trust for the enjoyment of the public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish, and may regulate the modes of enjoyment, so that they may not render the public property less valuable or destroy it altogether." "And this power (he says) results from the ownership of the soil, the legislative jurisdiction of the State over it, & from its duty to preserve those public
20 uses for which the soil is held." Among those public uses is the right of the people of the State to take & plant oysters, subject to the regulations of law. Ch. J. Marshall says, speaking for the court, in Johnson v. McIntosh, 8 Wheat., 584, "By the treaty which concluded the war of our Revolution, the powers of government & the right to soil which had previously been in Great Britain passed definitively to these States. Great Britain by that treaty relinquished all claim not only to the government, but to the propriety & territorial rights of the United States." C. J. Taney, (16 Peters, supra, p. 416,) says: "When the people of New Jersey took possession of the reins of government, & took in their own hands the powers of sovereignty, the prerogatives & royalties which before belonged either to the Crown or the Parliament became immediately & rightfully vested in the States." In the City of Mobile v. Eslaver, (16 Peters, 254,) Mr. Justice Catron said: "That the original States acquired by the Revolution the entire rights of soil & of sovereignty in the navigable waters within their territory, is most certain," and "that each & all of the States have sovereign power over their navigable waters, above & below the tide, no one doubts," (p. 259.)

Mr. Justice Washington said, in Corfield v. Coryell, 4 Wash.,
21 381, "A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, & the like, is as much the property of the individual to whom it belongs as dry land or land covered by water; and it is equally protected by the laws

of the State against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the States. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property, & they are so exclusively entitled to the use of it that it cannot be enjoyed by others without the tacit consent or the express permission of the sovereign who has the power to regulate its use." Grotius says, (b. 2, ch. 2, sec. 5,) "The sovereign who has dominion over the land, or waters in which the fish are, may prohibit foreigners from taking them."

22 It is the right to the use of land covered with water that is in question here, rather than the water which covers it; of land which may be applied to the planting & growing of oysters, and which may be used for that purpose, just as other lands are used for the purposes for which they are peculiarly adapted. The lands which may be used for the purpose of growing and cultivating oysters, as well as those upon which are her natural oyster-beds, which underly her navigable waters, Virginia claims not only sovereignty over, but also an ownership in the soil. If the State has the ownership in the soil & the sovereign dominion over it, unquestionably she had the right to prohibit the deposit or planting of oysters upon it, or the use of it for any purpose by non-residents, or others than citizens of the State.

There seems to have been some diversity of opinion amongst learned judges upon the question whether the title to the soil covered by the navigable waters of the State became absolutely vested by the Revolution in the State, or only in trust for the benefit of the people of the State. It is a question of no importance, as far as this case

23 is concerned, whether the people of Virginia were clothed with the legal title to the lands & waters in question, or only had a beneficial interest in them or right to their enjoyment. Have the people of Virginia no propriety-right in common in the soil flowed or covered by the navigable waters of the State? It matters not whether the soil under the navigable waters of Virginia, on which any person other than a citizen of Virginia is prohibited from planting oysters by the act of assembly in question, is the absolute property of the State of Virginia, or whether it is held by the Government in trust for the people of the State, who, in common, have an exclusive right to its enjoyment. It is a property in the enjoyment of which the people of other States have not a right to participate unless the people of Virginia have conceded to them the right in the Federal Constitution.

From what has been said it will appear that the people of each State had title to their navigable waters & to the soil under them, which was exclusive of the people of the other States, & all others. Have the States parted with their sovereignty over, & their property in,

24 these waters & the soils under them? Or have the people of each State covenanted & agreed by that solemn compact that the people of the other States shall participate with them, or become tenants in common with them, in the ownership & enjoyment of their navigable waters & the soils under them? It is true, as claimed by the learned counsel in argument, that Virginia subscribed that solemn instrument, & that she ought to be willing to abide her solemn act. There is nothing in her past history that can cause distrust in her devotion to the principles of that sacred instrument; and never through our instrumentality can those solemn pledges be falsified. The States cannot be benefitted by withholding from the central Government any part of the

power fairly delegated to it by the States in the Federal Constitution; nor will it promote the welfare of the United States for the Government thereof to encroach upon & to absorb the reserved rights of the States. Nothing would more surely, in our opinion, overthrow the republic and be destructive of the public liberty.

It is denied that Virginia has by any provision in the Constitution, expressly or impliedly, surrendered her sovereign dominion over or her ownership in her navigable waters & the soil under them,
25 except only to the extent that it may be necessary to enable Congress to execute the power & discharge the duty created or delegated by art. 1, section 8, of the Constitution, "to regulate commerce with foreign nations & among the several States." This clause has been construed to invest Congress with a control'ing power over the subject of navigation. And hence it follows that the States are so far restricted in the exercise of their reserved powers over their navigable waters, and in the use and enjoyment of their propriety in them & in the soil under them, so as not to impede, obstruct, or interfere with navigation.

As was said by Mr. Justice Thompson, in Martin v. Waddell, supra, "For the purpose of navigation, the water is considered a public highway common to all, like a public highway on land. If land over which a public highway passes is conveyed, the soil passes subject to that use. So with respect to the land under water; the public use for passing & repassing, & all the purposes for which a public way may be
26 used, are open to the public; the owner retaining, nevertheless, all the rights & benefits of the soil that may not impede or interfere with the use as a public highway. Should a coal-mine, for instance, be found under the highway, it would belong to the owner of the soil, & might be used for his benefit, preserving unimpaired the public highway. So with respect to an oyster-bed, which is local & attached to the soil; but the use of the soil by the owner, which is consistent with the use of the water by the public, is reserved to the owner." The power to control or regulate navigation is not given as an express or substantive power; it is only incidental to or resulting from the express power "to regulate commerce," and can only be used & exerted so far as it is necessary & proper to enable Congress "to regulate commerce with foreign nations and among the several States." And the sovereignty of the several States over, & ownership in, their respective navigable waters and the soil under them is restricted only by the power which Congress may exercise on the subject of navigation; and consequently their propriety in the oyster-beds & the soil under their navigable
27 waters respectively, & their power to regulate and control the taking & catching oysters, and the planting of them on the soil which belongs to them respectively, is plenary & perfect, inasmuch as the full enjoyment of the right & the exercise of the power cannot interfere with the subject of navigation, nor with the power of Congress to regulate commerce. The conclusion is therefore necessary that the act of assembly in question is not incompatible with & in violation of section 8, art. 1 of the Federal Constitution.

Is it incompatible with art. 4 & section 2? Did the people of Virginia, in adopting the Constitution, agree that the people of the other States should become joint owners with them of their oyster-beds, and of their navigable waters, & of the soil covered by them? And is this title conferred on the citizens of other States by the declaration that "the citizens of each State shall be entitled to all privileges & immunities of citizens of the several States?"

We think not. We have shown that this is a right of property, and we do not think that the clause in question was intended to transfer the rights of property of the citizens of one State to the citizens of the other States.

28 In Corfield v. Coryell, Mr. Justice Washington says, (4 Wash. C. C. R., p. 382,) "That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that State in express terms to the United States, is admitted by the counsel for the plaintiff;" (and we have, we think, shown that it has not been ceded by any of the States.) "And", (Judge Washington proceeds,) "having shown, as we think we have, that this right is a right of property, vested either in certain individuals or in the State for the use of the citizens thereof, it would, in our opinion, be going quite too far," (and we are of the same opinion,) "to construe the grant of privileges & immunities of citizens as amounting to a grant of a cotenancy in the common property of the State to the citizens of all the other States."

What is meant by privileges & immunities of citizens? Does it mean rights of property—an estate in the lands of the country, either dry lands or those covered with water? The same eminent judge says, "We feel no hesitation in confining these expressions to those privileges & immunities which are in their nature fundamental;" he proceeds then to explain what he means by fundamental privileges & immunities.

29 He says such as "belong of right to the citizens of all free governments, & which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, & sovereign." And he says they may be all comprehended under the following general heads: "Protection by the Government;" "The enjoyment of life & liberty;" "The right to acquire and possess property of every kind & to pursue happiness & safety." These are fundamental rights, and the citizens of any one of the States by this clause of the Constitution *is* guaranteed the same privileges & immunities for their enjoyment as in any other State that the citizens of that State enjoy. Whilst it guarantees to the citizens of one State the right to acquire & possess property of any kind in any other State, it does not give him the right to seize & hold the property belonging to the citizens of that other State, or to share with them in the enjoyment of property which belonged exclusively to them.

30 Therefore this eminent jurist justly says, "We cannot accede to the proposition which was insisted on by the counsel, that under this provision of the Constitution the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens." Again, he says, "We hold that the power to regulate the fisheries belonging to the several States, and to punish those who should transgress those regulations, was exclusively vested in the States respectively at the time when the present Constitution was adopted." And he adds that that power "was not surrendered to the United States by the mere grant of admiralty & maritime jurisdiction to the judicial branch of the Government," and in the course of his opinion he holds it was not surrendered at all.

31 If this opinion can be relied on as settling the law of the subject, we think it is decisive of this case. It is true that it is not binding authority upon this court. But when we consider by whom the

opinion was delivered, an eminent judge of the Supreme Court of the United States, who was cotemporary & intimately associated with those who framed the Constitution, & its cotemporaneous expounders who were familiar with the prerogatives & powers of the States before the adoption of the Federal Constitution; and when we consider the time when the opinion was pronounced, so soon after the Constitution was adopted, in connection with the surrounding circumstances, it may be regarded as itself a cotemporaneous exposition of the Constitution. And when we consider the intrinsic merit of the opinion, the support which its positions derives from reason & authority, & the reasonableness of its deductions; its repeated recognition as authority of the courts, State and Federal, nisi-prius & supreme, and the acquiescence of the country now for more than half a century in its doctrines, and the legislation of the States being in conformity thereto, we are disposed
32 to regard it as authoritative & as settling the law of the subject, especially as its exposition of the law is in conformity with our own views of what the law is.

Upon the whole we are of opinion that the act of assembly under which this indictment was found is not an infringement of the Constitution of the United States, or of any of its provisions.

The errors assigned, of a formal and technical character, in the petition to the circuit court for a writ of error, do not seem to have been relied on here, & are considered by the court as not showing ground for reversal. The judgment of the circuit court affirming the judgment of the county court must therefore be affirmed with costs.

33 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George L. Christian, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true copy of the record in the case of James W. McCready v. The Commonwealth of Virginia, lately depending in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Richmond, this 8th day of March, 1876.

[SEAL.] GEO. L. CHRISTIAN.

34 To the honorable Justice' of the Supreme Court of the United States:

The accompanying transcript is the record of the suit of James W. McCready, plaintiff in error, vs. The Commonwealth of Virginia, in which final judgment was rendered on the 17th day of February, 1876, by the supreme court of appeals of the State of Virginia. The suit was originally instituted by the Commonwealth of Virginia in the county court of Gloucester County, in which judgment was entered against said McCready in favor of said Commonwealth for the sum of $500 and costs. Said McCready, a citizen of the State of Maryland, was indicted in the said county court for planting oysters in Ware River, in said county, on the 1st of September, 1874, he being then and there other than a citizen of Virginia. A supersedeas to the judgment of the county court was granted by the judge of the circuit court of Gloucester County, and upon a hearing of the same the judgment of the county court was affirmed.

Thereupon the said McCready obtained a writ of error and supersedeas from the supreme court of appeals of Virginia to the judg-
35 ment of said circuit court, and upon a hearing of the same the judgment of said circuit court was affirmed as aforesaid.

The said suit involves the question, whether a certain act of the legislature of Virginia, passed on the 18th of April, 1874, declaring in its 22nd section, that "if any person other than a citizen of this State shall take or catch oysters or any shell-fish in any manner, or plant oysters in the waters thereof, he shall forfeit five hundred dollars, and the vessel, tackle, and appurtenances," is in conflict with the second section of the fourth article of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," or with the 8th section of the 1st article of said Constitution, which confers the power upon Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The indictment against McCready was a proceeding to recover a fine against him for planting oysters in the waters of Virginia. By no law of Virginia is any penalty imposed on a citizen of Virginia for
36 planting oysters in Virginia. All of her citizens are perfectly free to engage in any such business at pleasure; and they do engage in that business without hindrance, molestation, or penalty.

The oysters which were planted by McCready were his own private property, bought by him in entire conformity with the laws of Virginia, and in planting them he only availed himself of the privileges accorded by law to all the citizens of Virginia.

The decision of the said supreme court of appeals of Virginia was in favor of the validity of the act of the legislature aforesaid and adverse to the rights of the said McCready as a citizen of the State of Maryland, and as such entitled by virtue of the Constitution of the United States to the same privilege of planting as was given by the laws of Virginia to citizens of Virginia.

Your petitioner, the said James W. McCready, respectfully prays writ of error, to operate as a supersedeas to the said supreme court of appeals of Virginia, in the matter aforesaid.

JAMES W. McCREADY,
By Counsel.

37 Writ of error awarded, to operate as a supersedeas upon the filing of said writ of error and bond, with security, duly approved, in the sum of one thousand dollars, within ten days from this date.

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

MARCH 10, 1876.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the [SEAL] supreme court of appeals of the State of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James W. McCready, plaintiff in error, and the Commonwealth of Virginia, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such
39 their validity; or wherein was drawn in question the construction

of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said James W. McCready, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this tenth day of March, in the year of our Lord one thousand eight hundred and seventy-six.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Issued 10th March, 1876.

Allowed by—

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

(Indorsed:) The original of this writ has been filed in the clerk's office of the supreme court of appeals of Va.

GEO. L. CHRISTIAN, *C. C.*

MAR. 11, 1876.

40 United States of America to the Commonwealth of Virginia greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of Virginia, wherein James W. McCready is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 10 day of March, 1876.

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

41 On this eleventh day of March, 1876, personally appeared before me, the subscriber, Robert Ould, and makes oath that he delivered a true copy of the within citation to Raleigh T. Daniel, the attorney-general of the State of Virginia.

Sworn to and subscribed this eleventh day of March, 1876.

GEO. L. CHRISTIAN, *N. P.*

I acknowledge service of the within citation this eleventh day of March, 1876.

R. T. DANIEL,
Atty. Genl. of Virginia.

42 Know all men by these presents that we, James W. McCready and W. J. Johnson, the latter of Richmond, Virginia, are held and firmly bound unto the Commonwealth of Virginia in the full and just sum of one thousand dollars, to be paid to the said Commonwealth of Virginia, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this ninth day of March, 1876.

Whereas lately, at a term of the supreme court of appeals of the State of Virginia, held on the 17th day of February, 1876, in a suit depending in said court between James W. McCready afore-aid, plaintiff in error, and the Commonwealth of Virginia, defendant in error, judgment was rendered against the said James W. McCready, and the said James W. McCready having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation to the said Commonwealth of Virginia, citing and admonishing the said Commonwealth to be and appear at a Su-
43 preme Court of the United States to be holden at Washington the second Monday in October next:

Now the condition of the above obligation is such that if the said James W. McCready shall prosecute the said writ of error to effect, and answer all damages and costs if the said James W. McCready fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

J. W. McCREADY. [SEAL.]
W. J. JOHNSON. [SEAL.]

Approved March 10th, 1876.

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

CITY OF RICHMOND,
State of Virginia:

On this ninth day of March, 1876, before me, a notary public in and for said city, personally appeared W. J. Johnson, who made oath that he is worth, at least, one hundred thousand dollars over and above his just debts and any exemption to which he may be entitled by the laws of Virginia or the United States.

J. L. WARING, *N. P.*

44 The foregoing is a true copy of the bond given in the case of James W. McCready against the Commonwealth, upon a writ of error from a judgment of the supreme court of appeals of Virginia to the Supreme Court of the United States, the original of which has been filled in the clerk's office of the said supreme court of appeals of Virginia.

Teste:

GEO. L. CHRISTIAN, *C. C.*

(Indorsed:) McCready. Commonwealth of Va. Copy of sup's bond.

(Indorsement on cover:) No. 625. James W. McCready, plaintiff in error, vs. The Commonwealth of Virginia. Virginia Sup. Ct. of Appeals. Filed 4th April, 1876.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 625.

JAMES W. McCREADY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED APRIL 14, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 625.

JAMES W. McCREADY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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1 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at Richmond on Thursday, the seventeenth day of February, in the year one thousand eight hundred and seventy-six.

Be it remembered that heretofore, to wit, at a supreme court of appeals of Virginia, held at Richmond, on the 1 day of December, 1875, upon the petition of James W. McCready, a writ of supersedeas was awarded him to a judgment rendered by the circuit court of Gloucester County, on the 15th day of October, 1875, upon an indictment the Commonwealth of Virginia against him for a misdemeanor, whereby it was considered that a judgment rendered by the county court of said county, on the 5th day of July, 1875, on said indictment be affirmed with costs, upon the petitioner, or some one for him, entering into bond
2 with good security in the clerk's office of the said circuit court in the penalty of eight hundred dollars, with condition as prescribed by the Code of Virginia, edition of 1873, chapter 178, section 13, in a case in which a supersedeas is awarded.

The petition before referred to and the record accompanying the same, are in the words and figures following, to wit:

3 In the supreme court of appeals of Virginia, Richmond.

MCCREADY
vs.
COMMONWEALTH.

To the honorable judges of the supreme court of appeals of Virginia:

Your petitioner, James W. McCready, respectfully represents that he is aggrieved by a judgment of the circuit court of Gloucester County, rendered on the fifteenth day of October, 1875, on an indictment there pending against him.

It will appear from the transcript of the record herewith presented, that your petitioner was indicted at the October term of the circuit court, 1874, for planting oysters in Ware River, in said county, on the first of September, 1874, he "being then and there other than a citizen of this State." On the 9th of November, 1874, a summons was issued by John S. Cook, who was clerk of both circuit and county courts, to your petitioner to appear before the judge of the county court of said county at the first day of the December term to answer said indictment. This summons was returned executed, but your petitioner did not appear. The case was continued at that and the next quarterly term. At the July term, 1875, without any other process having been issued, and without any appearance by your petitioner, a jury was empannelled to try the case, who returned a verdict of guilty against your petitioner, and assessed his fine at $500. A judgment at the same time was entered upon the said verdict and for costs. A supersedeas to the judgment of the county court was granted by the judge of the circuit court of Gloucester County, and upon a hearing of the same on the 15th day of October, 1875, the judgment of the county court was affirmed.

This indictment was founded on the 22nd section of the act in relation to oysters, passed April 18th, 1874. The 22nd section declares
4 that "if any person other than a citizen of this State shall take or catch oysters or any shell-fish in any manner, or plant oysters in the waters thereof, or in the rivers Potomac or Pocomoke, he shall forfeit five hundred dollars, and the vessel, tackle, and appurtenances."

Your petitioner assigns the following errors in said judgment:

1. The indictment was found in the circuit court of Gloucester County. He was tried in the county court of the said county. It does not appear that any copy of the indictment was certified by the clerk of the circuit court to the county court as is required by law. (See Sessions Acts for 1874, page 160, sec. 16.) The county court could have no jurisdiction of the case until it had been duly certified to it by the clerk of the court wherein the indictment was found.

2. The jury assessed the fine, though the same was fixed by law. By the provisions of the Code, chap. 41, sec. 3, page 394, and by chap. 195, sec. 24, page 1209, the jury has only the right to assessa fine when the amount is not fixed by law. When it is fixed by law it becomes part of the judgment of the court. It is true that the fine as assessed by the jury is the same as that mentioned in the law, and the same as that named in the judgment of the court; but non constat but that the assessment by the jury determined and controlled the judgment of the court. Such would appear to have been the case from the record. It runs, "Therefore it is considered by the court that the Commonwealth recover against the said defendant the sum of five hundred dollars, the fine assessed as aforesaid." If the assessment of the fine in the verdict be regarded as surplusage, and therefore stricken out, we have then a judgment which is not supported by the record. The judgment is based upon the assessment and not upon that part of the verdict which found your petitioner guilty.

3. It will be observed that the section under which this indictment was found imposes a penalty only upon such persons as are not citizens of Virginia. Nowhere in this law, which seems to supersede all other laws on the subject, or in any other law, is there any penalty upon a citizen of Virginia for planting oysters. This case then fairly raises the question whether such State legislation as imposes a penalty upon citizens of other States, for the act of planting oysters within the waters of this State, and at the same time gives complete immunity to the citizens of this State in the same regard, is to be deemed to be in derrogation of the provisions of the Federal Constitution.

The tide ebbs and flows in Ware River. Is such legislation in derrogation of the exclusive right of Congress to regulate commerce? Is it in derrogation of the constitutional provision that "the citizens of each State shall be entitled to the privileges and immunities of citizens in the several States?" Is it in derrogation of the fourteenth amendment, which seems to contain ampler provisions on the same subject?

5 Clearly under this law of April, 1874, the citizens of Virginia have immunities which are not given to citizens of other States. They are free from penalties which are imposed upon the citizens of any other State. And this, too, by virtue of citizenship alone. The immunity belongs to every citizen of Virginia, and the penalty to the citizen of every other State. This legislation, therefore, is clearly against the letter of the Federal provision, and, as your petitioner is informed and believes, equally against its spirit. Any business within the limits of Virginia which is lawful to her own citizens, or as to which there is no penalty provided by law so far as they are concerned, is made lawful and without penalty by the Federal Constitution to the citizens of every other State. It may be that Virginia may prescribe limitations and conditions to the prosecution of any business, other than that of citizenship; it may be that she may restrict the conduct of such business to a certain class having certain qualifications; but when it is opened to all her people by virtue of their citizenship, the

same privilege attaches to the citizens of other States. What other meaning than that claimed can attach to the word "immunity" in the Federal Constitution? It surely must mean that if no penalty is imposed upon a citizen of Virginia for doing a certain thing, such for instance as planting oysters, no penalty can be lawfully imposed upon a citizen of a sister State. It has been frequently decided that the constitutional provision exempts a citizen of one State from higher taxes and impositions than are imposed upon the citizen of the other State. If that be so, will it not exempt from complete prohibition or an onerous penalty not imposed upon the home citizen? Mr. Justice Field (Paul vs. Virginia, 8 Wall., 180) says: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them; it insures to *to* them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws."

To the same effect is the decision of the U. S. Supreme Court in Ward vs. State of Maryland, 12 Wallace, 418. The decisions on this subject are grouped in Cooley's edition of Story's Commentaries, 2d vol., pages 558 to 564, and 650 to 658.

This legislation is also in conflict with the constitutional provision which gives to Congress the power to regulate commerce among the several States. It not only prohibits a citizen of Maryland from planting oysters taken from the waters of this State, but oysters brought
6 within the State from other States. The indictment is silent as to whether the oysters planted were a domestic product or brought from another State. In favor of innocence, if necessary, your petitioner can claim what is not denied in the indictment, that the oysters were not the domestic product of this State, but a legitimate subject of inter-State commerce. Congress has secured to the public the free and unobstructed use of the navigable waters of this State. These waters are free to commerce and to every subject of commerce, as oysters undoubtedly are. How that commerce is to be regulated or controlled is a matter of Federal and not State cognizance, except so far as mere police regulations are concerned. This legislation does not pretend or purport to be a police regulation. The fact that it is allowed to citizens without restriction is conclusive on that head. This legislation is nothing less than a regulation of inter-State commerce and traffic. Judge Story says "that the terms of the Constitution have at all times been understood to include a power over navigation, as well as trade; over intercourse, as well as traffic; and that in the practice of other countries, and especially in our own, there has been no diversity of judgment or opinion." (Cooley's edition of Story's Commentaries, 2 vol., sec. 1065, page 7.)

The public has a right under congressional enactments to use the navigable waters of Virginia for every purpose of lawful traffic, trade, or business, one of which is the planting of oysters.

Oysters are improved by planting, just as whiskey is improved by storage. What would be thought of a law which gave the privilege of storage to citizens of Virginia, but denied it to citizens of other States?

Such a law, besides being subject to other objections, would be a usurpation of the congressional power to regulate commerce. The only pos-

sible justification of such legislation would be that it was a proper exercise of the reserved police or sanitary powers of the State; and they must always be equal.

On the general subject, see Cooley's edition of Story's Commentaries, 2 vol., from page 2 to 23. See, also, 8 Cushing, 347, which sustains the right of the public independent of the Federal law.

For these and other reasons apparent on the record, your petitioner respectfully prays a writ of error and supersedeas.

JAMES W. McCREADY,
By OULD & CARRINGTON,
His Counsel.

We, Ould & Carrington, counsel practicing in the supreme court of appeals of Virginia, do hereby certify that in our opinion there is error in the aforesaid judgment of the circuit court of Gloucester County, and that the same ought to be reviewed and reversed.

OULD & CARRINGTON.

NOV. 25, 1875.

7 VIRGINIA:

At a circuit court, continued and held for Gloucester County, at the court-house, on Friday, the fifteenth day of October, one thousand eight hundred and seventy-five. Among the records and proceedings of the said court is the following case, to wit:

THE COMMONWEALTH *against* JAMES W. McCREADY.

Petition.

The petition of J. W. McCready represents that he is aggrieved by a judgment of the circuit court of Gloucester County, rendered on the 5th day of July, 1875, against him in a prosecution in the name of the Commonwealth of Virginia against your petitioner, being then and there other than a citizen of this State, for unlawfully planting oysters in the waters of Virginia. A transcript of the record of the said case is herewith presented, from which it will appear that the case is as follows:

At the fall term, 1874, of the circuit court of Gloucester County, an indictment was found by the grand jury then attending the *the* said court against your petitioner, that he, being other than a citizen of this State, did unlawfully, on the 1st day of September, 1874, plant oysters in the waters of this State. On the 9th of November, 1874, a summons was issued by John S. Cooke, the clerk of the said circuit court, who at the same time was clerk of the county court of said county, to your petitioner to appear before the judge of the county court of the said county at the first day of the December term next after the date of said summons to answer the said indictment. This summons was returned executed, but your petitioner did not appear.

At the December term of the said county court the case was continued, and at the next quarterly term, April, 1875, it was again continued. At the July term, 1875, without any other process having been issued and without any appearance by your petitioner, a jury was empannelled to try the said case, who returned a verdict of guilty against your petitioner, and assessed his fine at $500. A judgment at

the same term was entered upon the said verdict, and the costs of suit.

An execution has been sued out of the clerk's office of the said
8 circuit court against the goods of your petitioner, which came to the hands of Junius B. Browne, sheriff of the said county, and by him has been levied on the property of your petitioner.

Your petitioner assigns the following error in the said judgment:

First. The indictment was found in the circuit court of Gloucester County; no copy of the indictment was certified by the clerk to the county court. The county court could not take cognizance of or prosecute the case until it had been duly certified to it by the clerk of the circuit court, the judgment against your petitioner was by default, and this error is not cured. (See Acts of 1874, p. 160, § 16.)

Second. The case was tried when only one summons had issued against your petitioner, and no other process had issued. Your petitioner had never appeared, either in person or by counsel, and the judgment so rendered was erroneous. The 16th section of the same act also provides that in case of a misdemeanor, where no infamous or corporal punishment is inflicted, process shall in the first instance be a summons, but if the summons be 'turned executed or not found a capias may issue.

Third. The fine was fixed by law for the offence with which your petitioner was charged and the jury had no authority to assess the fine. They did assess it, however, and the judgment was entered for the fine so assessed.

Fourth. By the second section of the fourth article of the Constitution of the United States your petitioner, being a citizen of the State of Maryland, is entitled to all the privileges and immunities possessed and enjoyed by the citizens of Virginia in the waters of Virginia, and this right is again declared and guaranteed by the first section of the 14th amendment to the Constitution. Any enactment of the legislature of Virginia to deprive your petitioner of a right granted or secured to him by the Constitution of the United States, or which if enforced would have such effect, is of no effect.

For these and other reasons apparent on the face of the record of the case, your petitioner prays a writ of error and supersedeas to the said judgment.

J. W. McCREADY,
By M. B. SEAWELL, *his Att'y.*

I, M. B. Seawell, an attorney practicing in the circuit court of Gloucester County, do hereby certify that, in my opinion, the decision of the county court of Gloucester County in the case mentioned in the within petition should be reviewed by the said circuit court.

M. B. SEAWELL, *Att'y.*

9 Record referred to in the foregoing petition.

At a county court held for the county of Gloucester, at the courthouse, on Monday, the fifth day of July, one thousand eight hundred and seventy-five.

Among the records of the said court is the following case:

NINTH JUDICIAL CIRCUIT, GLOUCESTER COUNTY, *to wit:*

In the circuit court of the said county.

The jurors of the Commonwealth of Virginia, in and for the body of the county of Gloucester, now attending the said court, upon their oaths present that J. W. McCready, on the first day of September, 1874, in the said

county, and within the jurisdiction of this court, he, the said J. W. McCready, being then and there other than a citizen of this State, did unlawfully plant oysters in the waters thereof, to wit, in Ware River, against the peace and dignity of the Commonwealth of Virginia, upon the evidence of Richard C. Byrd, sworn in court, and sent to the grand jury.

Summons to answer.

The Commonwealth of Virginia to the sheriff of Gloucester County, greeting:

We command you to summon J. W. McCready to appear before the judge of our county court of Gloucester, at the court-house, on the first day of December term next, to answer an indictment of the grand jury made against him at October term last, of the circuit court of said county, for this, to wit: "That he, the said J. W. McCready, on the first day of September, 1874, in the said county, and within the jurisdiction of this court, he, the said J. W. McCready, being then and there other than a citizen of this State, did unlawfully plant oysters thereof, to wit, in Ware River, against the statute in that case made and provided, and against our peace and dignity." And have then and there this writ.

Witness John S. Cooke, clerk of our said court, this 9th day of November, 1874, in the 99th year of the Commonwealth.

10 *Sheriff's return.*

Executed by delivering a copy to J. McCready in person, on the 21st day of November, 1874.

J. B. BROWNE, *S. G. C.*

And at another day, to wit, at a court held for the county aforesaid, at the court-house, on Saturday, the 12th day of December, 1874.

THE COMMONWEALTH *against* J. W. McCREADY. } Upon an indictment of the grand jury.

This case is continued until the next term.

And at another day, to wit, at a court continued and held for the county aforesaid, at the court-house, on Wednesday, the 14th day of April, 1875.

THE COMMONWEALTH *against* J. W. McCREADY. } Upon an indictment of the grand jury.

This case is continued for the defendant until the next term.

And now at this day, to wit, at a county court held for the county aforesaid, at the court-house, on Monday, the 5th day of July, 1875, being the same day and year first aforesaid.

THE COMMONWEALTH *against* J. W. McCREADY. } Upon an indictment of the grand jury, for unlawfully planting oysters in Ware River on the 1st day of September, 1874, the said J. W. McCready being other than a resident citizen of this State.

This day came the attorney prosecuting for the Commonwealth, and the defendant not appearing, the plea of not guilty was entered by the

court, and issue being joined, thereupon came a jury, to wit,
11 Charles E. Allard, Wm. R. Leavitt, H. T. Sears, Thos. Harwood, Jas. T. Gray, Thos. M. P. Fary, Smith W. Brown, A. Wright, Alexander Pointer, Thos. C. Chapman, Jas. R. Bridges, and Nat. B. Leigh, who, being elected, tried, and sworn the truth to speak upon the issue joined, retired to their room to consult of their verdict; and after some time returned into court and brought in a verdict in the words and figures following, to wit:

"We, the jury, find the defendant guilty, and assess his fine at five hundred dollars.

"A. W. WRIGHT, *Foreman.*"

Thereupon it is considered by the court that the Commonwealth recover against the said defendant the sum of five hundred dollars, the fine assessed as aforesaid, and also her costs by her about her suit in this behalf expended, and the said defendant may be taken, &c.

Execution.

The Commonwealth of Virginia to the sheriff of Gloucester County, greeting:

We command you that of the goods and chattles of J. W. McCready, late in your baliwick, you cause to made five hundred dollars, which the Commonwealth lately, in our county court of Gloucester, recovered against the said J. W. McCready, for a fine imposed upon him for planting oysters in the waters of Virginia contrary to law, he being a non-resident citizen; also twenty-three dollars and seventy-five cents, which to the said Commonwealth in the same court were adjudged for her costs by her about her suit in that behalf expended; whereof the said J. W. McCready is convict as appears to us of record; and that you have the same before the judge of our said county court, at the court-house, on the first Monday in October next, to render to the said Commonwealth of the fine and costs aforesaid, and have then there this writ.

Witness, John S. Cooke, clerk of our said court, at the court-house, this 26th day of July, 1875, in 100th year of the Commonwealth.

JNO. S. COOKE, *C. C.*

Came to hand on the 12th day of August, 1875, at 1 o'clock p. m.

J. B. BROWNE, *S. G. C.*

12 *Sheriff's return:*

Levied this execution on a lot of oysters on Conklin Bar, in North River, supposed to be a thousand bushels; 2 flat-boats, 1 oyster-house, five pr. oyster-tongs, 1 lot oysters on Caroline Bar, 1 lot oysters opposite to Waverly shanty, 1 skiff, 1 lot oysters in Ware River, on Ware Point shore, supposed to contain from 3,000 to 10,000 bushels, 1 boat and 1 shanty; which was advertised to be sold on the 16th September, 1875, and the sale was prevented by a supersedeas issued from the circuit court of Gloucester County.

J. B. BROWNE, *S. G. C.*

And now at this day, to wit, at a circuit court, continued and held for the county aforesaid, at the court-house, on Friday, the 15th day of October, one thousand eight hundred and seventy-five, being the same day and year first herein mentioned.

JAMES W. McCREADY, APPELLANT, *against* THE COMMONWEALTH, APPELLEE. } Upon a supersedeas to a judgment of the county court of Gloucester County.

This day came as well the plaintiff in error, by his attorney, as the Commonwealth, by her attorney; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion that there is no error in the said judgment. It is therefore considered by the court that the same be affirmed, and that the Commonwealth recover against the plaintiff in error her costs by her about her defence in this behalf expended.

STATE OF VIRGINIA,
Gloucester County, to wit:

I, John S. Cooke, clerk of the circuit court for the county aforesaid, in the State of Virginia, do certify that the foregoing is a true transcript of the record in the case of James W. McCready against the Commonwealth, lately decided in said court.

Given under my hand this 11th day of November, 1875.

JNO. S. COOKE, *C. C.*

Clerk's fee for this transcript, $2.50.

A copy—teste:

GEO. L. CHRISTIAN, *C. C.*

13 And at another day, to wit, at a supreme court of appeals of Virginia, held at Richmond on the 18 day of January, 1876, came as well the plaintiff in error, by his counsel, as the attorney-general on behalf the Commonwealth; and this cause, having been partly heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel, was continued till the morrow.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 20 day of January, 1876, this cause was further heard upon the transcript of the record of the judgment aforesaid, and continued until the morrow.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 21 day of January, 1876, this cause was further heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel, and continued until the morrow.

14 And at another day, to wit, at a supreme court of appeals of Virginia, held on the 22 day of January, 1876, this cause was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel; but because the court was not then advised of its judgment to be given in the premises, time was taken to consider thereof.

And now at this day, to wit, at a supreme court of appeals of Virginia, held at Richmond, on the same day and year first herein mentioned, to wit, Thursday, the 17 day of February, 1876.

JAMES W. McCREADY, PLAINTIFF, *against* THE COMMONWEALTH OF VIRGINIA. }

Upon a writ of supersedeas to a judgment rendered by the circuit court of Gloucester County, on the 15th day of October, 1875, affirming with costs a judgment rendered by the county court of said county on

the 5th day of July, 1875, in a prosecution by the Commonwealth against the plaintiff in error, for unlawfully planting oysters in Ware River on the 1st day of September, 1874, the said plaintiff in error being other than a resident of this State; whereby it was considered that the
15 Commonwealth recover against him five hundred dollars, and her costs by her in that behalf expended.

This day came again as well the plaintiff in error, by his counsel, as the attorney-general on behalf of the Commonwealth; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that there is no error in the said judgment. Therefore, it is considered that the same be affirmed, and that the Commonwealth recover against the said plaintiff in error damages according to law, and her costs by her about her defence in this behalf expended.

And at the instance of the counsel for the plaintiff in error, the court certifies that in the record, and at the hearing of this cause, there was drawn in question the validity of the 22nd section of the act of the general assembly of Virginia, approved April 18, 1874, entitled "An act for the preservation of oysters, and to obtain revenue for the privilege of taking them within the waters of this Commonwealth," on the ground that said section of said act is repugnant to section 2 of article
16 4, and section 8 of article 1 of the Constitution of the United States, and that the decision of this court is in favor of the validity of said section of said act, and against the title, right, and privilege set up and claimed under the said sections of said articles of said Constitution, as claimed by the said plaintiff in error, to plant oysters in the waters of this Commonwealth, he being a resident of the State of Maryland, and in opposition to said section of said act of the general assembly of Virginia.

Which is ordered to be certified to the said circuit court of Gloucester County.

17 The reasons, in writing, for the opinion of the court, as stated in the judgment preceding, are in the words and figures following:

Opinion.

McCready
v.
The Commonwealth of Virginia.

By an act of assembly approved April 18, 1874, (§ 22, chap. 214, p. 243, Sess. Acts 1874,) "If any person (other than a citizen of this State) shall take or catch oysters, or other shell-fish, in any manner, or plant oyster in the waters thereof" &c., "he shall forfeit $500, and the vessel, tackle, & appurtenances." This is an indictment against the plaintiff in error, who is other than a citizen of this State, for planting oysters in the waters thereof, to wit, in Ware River, in violation of s'd 22 section.

The prosecution is resisted upon the ground that the above section is an infringement of the Constitution of the United States, because it is contrary, first, to art. 4, section 2: "The citizens of each State
18 shall be entitled to all privileges & immunities of citizens of the several States;" and, second, to art. 1, section 8: "The Congress shall have power to regulate commerce with foreign nations & among the several States," &c.

It seems to be well settled that the States respectively are entitled to the navigable waters within their several territorial limits, including both the water & the land under the water. In Martin against Waddell, (16 Peters, 407,) Ch. J. Taney, speaking for a majority of the court, says: "We do not propose to meddle with the point as to the power of the king, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom; for when the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters & the soils under them for their own common use." As expressed by Ch. Justice Kirkpatrick of the supreme court of New Jersey, "The people of the State since the Revolution being invested with the regal rights as sovereign, and having themselves both the legal estate and the usufruct, may make such disposition of them, & such regulations
19 concerning them as they may think fit," "subject only," Ch. Justice Taney adds, "to the rights since surrendered by the Constitution to the General Government." We will after a while consider what they are.

In Smith v. State of Maryland, (18 How. U. S. Rep., p. 74,) it was held by the Supreme Court of the U. S., Mr. Justice Curtis delivering the opinion, "that whatever soil below low-water mark is the subject of exclusive propriety & ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the declaration of independence." He goes on further to say, "The State holds the property of the soil in some sense in trust for the enjoyment of the public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish, and may regulate the modes of enjoyment, so that they may not render the public property less valuable or destroy it altogether." "And this power (he says) results from the ownership of the soil, the legislative jurisdiction of the State over it, & from its duty to preserve those public
20 uses for which the soil is held." Among those public uses is the right of the people of the State to take & plant oysters, subject to the regulations of law. Ch. J. Marshall says, speaking for the court, in Johnson v. McIntosh, 8 Wheat., 584, "By the treaty which concluded the war of our Revolution, the powers of government & the right to soil which had previously been in Great Britain passed definitively to these States. Great Britain by that treaty relinquished all claim not only to the government, but to the propriety & territorial rights of the United States." C. J. Taney, (16 Peters, supra, p. 416,) says: "When the people of New Jersey took possession of the reins of government, & took in their own hands the powers of sovereignty, the prerogatives & royalties which before belonged either to the Crown or the Parliament became immediately & rightfully vested in the States." In the City of Mobile v. Eslaver, (16 Peters, 254,) Mr. Justice Catron said: "That the original States acquired by the Revolution the entire rights of soil & of sovereignty in the navigable waters within their territory, is most certain," and "that each & all of the States have sovereign power over their navigable waters, above & below the tide, no one doubts," (p. 259.)

Mr. Justice Washington said, in Corfield v. Coryell, 4 Wash.,
21 381, "A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, & the like, is as much the property of the individual to whom it belongs as dry land or land covered by water; and it is equally protected by the laws

of the State against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the States. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property, & they are so exclusively entitled to the use of it that it cannot be enjoyed by others without the tacit consent or the express permission of the sovereign who has the power to regulate its use." Grotius says, (b. 2, ch. 2, sec. 5,) "The sovereign who has dominion over the land. or waters in which the fish are, may prohibit foreigners from taking them."

22 It is the right to the use of land covered with water that is in question here, rather than the water which covers it; of land which may be applied to the planting & growing of oysters, and which may be used for that purpose, just as other lands are used for the purposes for which they are peculiarly adapted. The lands which may be used for the purpose of growing and cultivating oysters, as well as those upon which are her natural oyster-beds, which underly her navigable waters, Virginia claims not only sovereignty over, but also an ownership in the soil. If the State has the ownership in the soil & the sovereign dominion over it, unquestionably she had the right to prohibit the deposit or planting of oysters upon it, or the use of it for any purpose by non-residents, or others than citizens of the State.

There seems to have been some diversity of opinion amongst learned judges upon the question whether the title to the soil covered by the navigable waters of the State became absolutely vested by the Revolution in the State, or only in trust for the benefit of the people of the State. It is a question of no importance, as far as this case

23 is concerned, whether the people of Virginia were clothed with the legal title to the lands & waters in question, or only had a beneficial interest in them or right to their enjoyment. Have the people of Virginia no propriety-right in common in the soil flowed or covered by the navigable waters of the State? It matters not whether the soil under the navigable waters of Virginia, on which any person other than a citizen of Virginia is prohibited from planting oysters by the act of assembly in question, is the absolute property of the State of Virginia, or whether it is held by the Government in trust for the people of the State, who, in common, have an exclusive right to its enjoyment. It is a property in the enjoyment of which the people of other States have not a right to participate unless the people of Virginia have conceded to them the right in the Federal Constitution.

From what has been said it will appear that the people of each State had title to their navigable waters & to the soil under them, which was exclusive of the people of the other States, & all others. Have the States parted with their sovereignty over, & their property in,

24 these waters & the soils under them? Or have the people of each State covenanted & agreed by that solemn compact that the people of the other States shall participate with them, or become tenants in common with them, in the ownership & enjoyment of their navigable waters & the soils under them? It is true, as claimed by the learned counsel in argument, that Virginia subscribed that solemn instrument, & that she ought to be willing to abide her solemn act. There is nothing in her past history that can cause distrust in her devotion to the principles of that sacred instrument; and never through our instrumentality can those solemn pledges be falsified. The States cannot be benefitted by withholding from the central Government any part of the

power fairly delegated to it by the States in the Federal Constitution; nor will it promote the welfare of the United States for the Government thereof to encroach upon & to absorb the reserved rights of the States. Nothing would more surely, in our opinion, overthrow the republic and be destructive of the public liberty.

It is denied that Virginia has by any provision in the Constitution, expressly or impliedly, surrendered her sovereign dominion over or her ownership in her navigable waters & the soil under them,
25 except only to the extent that it may be necessary to enable Congress to execute the power & discharge the duty created or delegated by art. 1, section 8, of the Constitution, "to regulate commerce with foreign nations & among the several States." This clause has been construed to invest Congress with a control'ing power over the subject of navigation. And hence it follows that the States are so far restricted in the exercise of their reserved powers over their navigable waters, and in the use and enjoyment of their propriety in them & in the soil under them, so as not to impede, obstruct, or interfere with navigation.

As was said by Mr. Justice Thompson, in Martin v. Waddell, supra, "For the purpose of navigation, the water is considered a public highway common to all, like a public highway on land. If land over which a public highway passes is conveyed, the soil passes subject to that use. So with respect to the land under water; the public use for passing & repassing, & all the purposes for which a public way may be
26 used, are open to the public; the owner retaining, nevertheless, all the rights & benefits of the soil that may not impede or interfere with the use as a public highway. Should a coal-mine, for instance, be found under the highway, it would belong to the owner of the soil, & might be used for his benefit, preserving unimpaired the public highway. So with respect to an oyster-bed, which is local & attached to the soil; but the use of the soil by the owner, which is consistent with the use of the water by the public, is reserved to the owner." The power to control or regulate navigation is not given as an express or substantive power; it is only incidental to or resulting from the express power "to regulate commerce," and can only be used & exerted so far as it is necessary & proper to enable Congress "to regulate commerce with foreign nations and among the several States." And the sovereignty of the several States over, & ownership in, their respective navigable waters and the soil under them is restricted only by the power which Congress may exercise on the subject of navigation; and consequently their propriety in the oyster-beds & the soil under their navigable
27 waters respectively, & their power to regulate and control the taking & catching oysters, and the planting of them on the soil which belongs to them respectively, is plenary & perfect, inasmuch as the full enjoyment of the right & the exercise of the power cannot interfere with the subject of navigation, nor with the power of Congress to regulate commerce. The conclusion is therefore necessary that the act of assembly in question is not incompatible with & in violation of section 8, art. 1 of the Federal Constitution.

Is it incompatible with art. 4 & section 2? Did the people of Virginia, in adopting the Constitution, agree that the people of the other States should become joint owners with them of their oyster-beds, and of their navigable waters, & of the soil covered by them? And is this title conferred on the citizens of other States by the declaration that "the citizens of each State shall be entitled to all privileges & immunities of citizens of the several States?"

We think not. We have shown that this is a right of property, and we do not think that the clause in question was intended to transfer the rights of property of the citizens of one State to the citizens of the other States.

28 In Corfield v. Coryell, Mr. Justice Washington says, (4 Wash. C. C. R., p. 382,) "That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that State in express terms to the United States, is admitted by the counsel for the plaintiff;" (and we have, we think, shown that it has not been ceded by any of the States.) "And", (Judge Washington proceeds,) "having shown, as we think we have, that this right is a right of property, vested either in certain individuals or in the State for the use of the citizens thereof, it would, in our opinion, be going quite too far," (and we are of the same opinion,) "to construe the grant of privileges & immunities of citizens as amounting to a grant of a cotenancy in the common property of the State to the citizens of all the other States."

What is meant by privileges & immunities of citizens? Does it mean rights of property—an estate in the lands of the country, either dry lands or those covered with water? The same eminent judge says, "We feel no hesitation in confining these expressions to those privileges & immunities which are in their nature fundamental;" he proceeds then to explain what he means by fundamental privileges & immunities.

29 He says such as "belong of right to the citizens of all free governments, & which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, & sovereign." And he says they may be all comprehended under the following general heads: "Protection by the Government;" "The enjoyment of life & liberty;" "The right to acquire and possess property of every kind & to pursue happiness & safety." These are fundamental rights, and the citizens of any one of the States by this clause of the Constitution *is* guaranteed the same privileges & immunities for their enjoyment as in any other State that the citizens of that State enjoy. Whilst it guarantees to the citizens of one State the right to acquire & possess property of any kind in any other State, it does not give him the right to seize & hold the property belonging to the citizens of that other State, or to share with them in the enjoyment of property which belonged exclusively to them.

30 Therefore this eminent jurist justly says, "We cannot accede to the proposition which was insisted on by the counsel, that under this provision of the Constitution the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens." Again, he says, "We hold that the power to regulate the fisheries belonging to the several States, and to punish those who should transgress those regulations, was exclusively vested in the States respectively at the time when the present Constitution was adopted." And he adds that that power "was not surrendered to the United States by the mere grant of admiralty & maritime jurisdiction to the judicial branch of the Government," and in the course of his opinion he holds it was not surrendered at all.

31 If this opinion can be relied on as settling the law of the subject, we think it is decisive of this case. It is true that it is not binding authority upon this court. But when we consider by whom the

opinion was delivered, an eminent judge of the Supreme Court of the United States, who was cotemporary & intimately associated with those who framed the Constitution, & its cotemporaneous expounders who were familiar with the prerogatives & powers of the States before the adoption of the Federal Constitution; and when we consider the time when the opinion was pronounced, so soon after the Constitution was adopted, in connection with the surrounding circumstances, it may be regarded as itself a cotemporaneous exposition of the Constitution. And when we consider the intrinsic merit of the opinion, the support which its positions derives from reason & authority, & the reasonableness of its deductions; its repeated recognition as authority of the courts, State and Federal, nisi-prius & supreme, and the acquiescence of the country now for more than half a century in its doctrines, and the legislation of the States being in conformity thereto, we are disposed
32 to regard it as authoritative & as settling the law of the subject, especially as its exposition of the law is in conformity with our own views of what the law is.

Upon the whole we are of opinion that the act of assembly under which this indictment was found is not an infringement of the Constitution of the United States, or of any of its provisions.

The errors assigned, of a formal and technical character, in the petition to the circuit court for a writ of error, do not seem to have been relied on here, & are considered by the court as not showing ground for reversal. The judgment of the circuit court affirming the judgment of the county court must therefore be affirmed with costs.

33 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George L. Christian, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true copy of the record in the case of James W. McCready v. The Commonwealth of Virginia, lately depending in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Richmond, this 8th day of March, 1876.

[SEAL.] GEO. L. CHRISTIAN.

34 To the honorable Justice' of the Supreme Court of the United States:

The accompanying transcript is the record of the suit of James W. McCready, plaintiff in error, vs. The Commonwealth of Virginia, in which final judgment was rendered on the 17th day of February, 1876, by the supreme court of appeals of the State of Virginia. The suit was originally instituted by the Commonwealth of Virginia in the county court of Gloucester County, in which judgment was entered against said McCready in favor of said Commonwealth for the sum of $500 and costs. Said McCready, a citizen of the State of Maryland, was indicted in the said county court for planting oysters in Ware River, in said county, on the 1st of September, 1874, he being then and there other than a citizen of Virginia. A supersedeas to the judgment of the county court was granted by the judge of the circuit court of Gloucester County, and upon a hearing of the same the judgment of the county court was affirmed.

Thereupon the said McCready obtained a writ of error and supersedeas from the supreme court of appeals of Virginia to the judg-
35 ment of said circuit court, and upon a hearing of the same the judgment of said circuit court was affirmed as aforesaid.

The said suit involves the question, whether a certain act of the legislature of Virginia, passed on the 18th of April, 1874, declaring in its 22nd section, that "if any person other than a citizen of this State shall take or catch oysters or any shell-fish in any manner, or plant oysters in the waters thereof, he shall forfeit five hundred dollars, and the vessel, tackle, and appurtenances," is in conflict with the second section of the fourth article of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," or with the 8th section of the 1st article of said Constitution, which confers the power upon Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The indictment against McCready was a proceeding to recover a fine against him for planting oysters in the waters of Virginia. By no law of Virginia is any penalty imposed on a citizen of Virginia for
36 planting oysters in Virginia. All of her citizens are perfectly free to engage in any such business at pleasure; and they do engage in that business without hindrance, molestation, or penalty.

The oysters which were planted by McCready were his own private property, bought by him in entire conformity with the laws of Virginia, and in planting them he only availed himself of the privileges accorded by law to all the citizens of Virginia.

The decision of the said supreme court of appeals of Virginia was in favor of the validity of the act of the legislature aforesaid and adverse to the rights of the said McCready as a citizen of the State of Maryland, and as such entitled by virtue of the Constitution of the United States to the same privilege of planting as was given by the laws of Virginia to citizens of Virginia.

Your petitioner, the said James W. McCready, respectfully prays writ of error, to operate as a supersedeas to the said supreme court of appeals of Virginia, in the matter aforesaid.

JAMES W. McCREADY,
By Counsel.

37 Writ of error awarded, to operate as a supersedeas upon the filing of said writ of error and bond, with security, duly approved, in the sum of one thousand dollars, within ten days from this date.

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

MARCH 10, 1876.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the [SEAL] supreme court of appeals of the State of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James W. McCready, plaintiff in error, and the Commonwealth of Virginia, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such
39 their validity; or wherein was drawn in question the construction

of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said James W. McCready, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this tenth day of March, in the year of our Lord one thousand eight hundred and seventy-six.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Issued 10th March, 1876.

Allowed by—

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

(Indorsed:) The original of this writ has been filed in the clerk's office of the supreme court of appeals of Va.

GEO. L. CHRISTIAN, *C. C.*

MAR. 11, 1876.

40 United States of America to the Commonwealth of Virginia greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of Virginia, wherein James W. McCready is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 10 day of March, 1876.

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

41 On this eleventh day of March, 1876, personally appeared before me, the subscriber, Robert Ould, and makes oath that he delivered a true copy of the within citation to Raleigh T. Daniel, the attorney-general of the State of Virginia.

Sworn to and subscribed this eleventh day of March, 1876.

GEO. L. CHRISTIAN, *N. P.*

I acknowledge service of the within citation this eleventh day of March, 1876.

R. T. DANIEL,
Atty. Genl. of Virginia.

42 Know all men by these presents that we, James W. McCready and W. J. Johnson, the latter of Richmond, Virginia, are held and firmly bound unto the Commonwealth of Virginia in the full and just sum of one thousand dollars, to be paid to the said Commonwealth of Virginia, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this ninth day of March, 1876.

Whereas lately, at a term of the supreme court of appeals of the State of Virginia, held on the 17th day of February, 1876, in a suit depending in said court between James W. McCready afore-said, plaintiff in error, and the Commonwealth of Virginia, defendant in error, judgment was rendered against the said James W. McCready, and the said James W. McCready having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation to the said Commonwealth of Virginia, citing and admonishing the said Commonwealth to be and appear at a Su-
43 preme Court of the United States to be holden at Washington the second Monday in October next:

Now the condition of the above obligation is such that if the said James W. McCready shall prosecute the said writ of error to effect, and answer all damages and costs if the said James W. McCready fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

J. W. McCREADY. [SEAL.]
W. J. JOHNSON. [SEAL.]

Approved March 10th, 1876.

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

CITY OF RICHMOND,
State of Virginia:

On this ninth day of March, 1876, before me, a notary public in and for said city, personally appeared W. J. Johnson, who made oath that he is worth, at least, one hundred thousand dollars over and above his just debts and any exemption to which he may be entitled by the laws of Virginia or the United States.

J. L. WARING, *N. P.*

44 The foregoing is a true copy of the bond given in the case of James W. McCready against the Commonwealth, upon a writ of error from a judgment of the supreme court of appeals of Virginia to the Supreme Court of the United States, the original of which has been filled in the clerk's office of the said supreme court of appeals of Virginia.

Teste:

GEO. L. CHRISTIAN, *C. C.*

(Indorsed:) McCready. Commonwealth of Va. Copy of sup's bond.

(Indorsement on cover:) No. 625. James W. McCready, plaintiff in error, vs. The Commonwealth of Virginia. Virginia Sup. Ct. of Appeals. Filed 4th April, 1876.

REC. 625—2

IN THE

Supreme Court of the United States.

JAMES W. McCREADY
vs.
THE COMMONWEALTH OF VIRGINIA. } *Appellant's brief.*

James W. McCready, a citizen of Maryland, was indicted in 1874, under the charge of unlawfully planting oysters in the waters of Virginia. He was found guilty and fined $500.

The indictment was framed under the 22nd section of the act of April 19th, 1874 (Sessions Acts of the Legislature of Virginia for the year 1874, page 243), which enacted that "if any person (other than a citizen of this State) shall take or catch oysters or other shell-fish in any manner, or plant oysters in the waters thereof, he shall forfeit five hundred dollars."

The rights of the citizens or people of Virginia, in respect to catching or planting oysters, are defined in the 1st section of the abovementioned act of April 19th, 1874.

Said 1st section is as follows:

"All the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this Commonwealth, and not covered by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a

common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shell-fish, subject to the reservations and restrictions hereinafter imposed."

This section is only a continuation of the same legislation almost time out of mind. Although the word "planting" is not specifically used in the 1st section, it is included in the sentence "purpose of fishing and fowling, and of taking and catching oysters and other shell-fish."

Independent of all legislation on the subject, the people or citizens of Virginia, from the foundation of the State, have always exercised and enjoyed, without any hindrance or charge, the right of planting oysters in the waters of the State, including the *locus in quo* named in the indictment, to wit: Ware river. Both by the common law and by State legislation, all the citizens or people of Virginia have the right to use as a common for the purpose of fishing and of taking, catching and planting oysters, the beds of her navigable waters.

There is but one question involved in this controversy. Is the law of Virginia, imposing a penalty upon a citizen of Maryland for planting oysters, when the citizens of Virginia are at full liberty to plant, in conflict with the Constitution of the United States?

This is not a question whether Virginia can prohibit non-residents from *taking or catching* oysters in the navigable waters of the State, but whether she can prohibit them from *planting* oysters. In this respect the question is entirely new, never having been made the subject of decision, Federal or State. In our view the two things are very different, though in so saying we do not mean to be understood as admitting that Virginia can prohibit a citizen of Maryland from taking or catching oysters, if the same is left freely open to the citizens of Virginia.

I. We maintain that the said legislation of Virginia is in violation of the 2nd section of the 4th article of the Federal Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

We maintain:

1. That Virginia, both at common law and under her own statute, holds the beds of its navigable waters in trust for the common benefit of all its people or citizens.

2. That being so held, the rights of the citizens of Virginia, which spring from citizenship, enure, by force of the Federal Constitution, to the benefit of the citizens of other States, even against a limitation in the State statute. Such limitation is void, because, in derogation of Virginia's compact found in the supreme law. The constitution acts upon the grant in the State law in favor of the citizens of Virginia, and securing the same benefit to citizens of other States, nullifies the restriction in the State law.

3. That the State can fully and effectually regulate the use of its fisheries, and apply its police power to their management; but that all such regulations must be in subordination to the Federal Constitution, and must be made to apply to its own citizens as well as the citizens of other States.

4. That the law as to shell-fish, so far as the right to use or appropriate them is concerned, is the same as that which applies to floating fish.

5. That the right to plant oysters is distinct from the right to take or catch, and even if the constitutional provision does not secure the latter, it does secure the former to the citizens of other States, as no abstraction of any property held by the State is involved therein.

6. That the State holds its different kinds of property in different rights. It has its private property as a private citizen has, which it can control as fully as the private citizen can his. It also has its public property, of which its citizens have the use and enjoyment, but which its own citizens cannot appropriate; such as its public buildings and grounds, and as to which the citizens of other States have the same right of user and enjoyment, but not of appropriation. The State also holds a third class of property, such as its floating and embedded fish, as to which there can be no use or enjoyment, except in appropriation; and when the right of user by appropriation is given by the State to its own citizens, the Federal Constitution secures the same right of user by appropriation to the citizens of the other States.

7. That the Constitutional provision applies to tangible property as well as to incorporal privileges, where the right to use or appropriate tangible property held by the State is conferred upon all its citizens.

IN THE

Supreme Court of the United States.

JAMES W. MCCREADY
vs.
THE COMMONWEALTH OF VIRGINIA. } *Appellant's brief.*

James W. McCready, a citizen of Maryland, was indicted in 1874, under the charge of unlawfully planting oysters in the waters of Virginia. He was found guilty and fined $500.

The indictment was framed under the 22nd section of the act of April 19th, 1874 (Sessions Acts of the Legislature of Virginia for the year 1874, page 243), which enacted that "if any person (other than a citizen of this State) shall take or catch oysters or other shell-fish in any manner, or plant oysters in the waters thereof, he shall forfeit five hundred dollars."

The rights of the citizens or people of Virginia, in respect to catching or planting oysters, are defined in the 1st section of the abovementioned act of April 19th, 1874.

Said 1st section is as follows:

"All the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this Commonwealth, and not covered by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a

common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shell-fish, subject to the reservations and restrictions hereinafter imposed."

This section is only a continuation of the same legislation almost time out of mind. Although the word "planting" is not specifically used in the 1st section, it is included in the sentence "purpose of fishing and fowling, and of taking and catching oysters and other shell-fish."

Independent of all legislation on the subject, the people or citizens of Virginia, from the foundation of the State, have always exercised and enjoyed, without any hindrance or charge, the right of planting oysters in the waters of the State, including the *locus in quo* named in the indictment, to wit: Ware river. Both by the common law and by State legislation, all the citizens or people of Virginia have the right to use as a common for the purpose of fishing and of taking, catching and planting oysters, the beds of her navigable waters.

There is but one question involved in this controversy. Is the law of Virginia, imposing a penalty upon a citizen of Maryland for planting oysters, when the citizens of Virginia are at full liberty to plant, in conflict with the Constitution of the United States?

This is not a question whether Virginia can prohibit non-residents from *taking or catching* oysters in the navigable waters of the State, but whether she can prohibit them from *planting* oysters. In this respect the question is entirely new, never having been made the subject of decision, Federal or State. In our view the two things are very different, though in so saying we do not mean to be understood as admitting that Virginia can prohibit a citizen of Maryland from taking or catching oysters, if the same is left freely open to the citizens of Virginia.

I. We maintain that the said legislation of Virginia is in violation of the 2nd section of the 4th article of the Federal Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

We maintain:

1. That Virginia, both at common law and under her own statute, holds the beds of its navigable waters in trust for the common benefit of all its people or citizens.

2. That being so held, the rights of the citizens of Virginia, which spring from citizenship, enure, by force of the Federal Constitution, to the benefit of the citizens of other States, even against a limitation in the State statute. Such limitation is void, because, in derogation of Virginia's compact found in the supreme law. The constitution acts upon the grant in the State law in favor of the citizens of Virginia, and securing the same benefit to citizens of other States, nullifies the restriction in the State law.

3. That the State can fully and effectually regulate the use of its fisheries, and apply its police power to their management; but that all such regulations must be in subordination to the Federal Constitution, and must be made to apply to its own citizens as well as the citizens of other States.

4. That the law as to shell-fish, so far as the right to use or appropriate them is concerned, is the same as that which applies to floating fish.

5. That the right to plant oysters is distinct from the right to take or catch, and even if the constitutional provision does not secure the latter, it does secure the former to the citizens of other States, as no abstraction of any property held by the State is involved therein.

6. That the State holds its different kinds of property in different rights. It has its private property as a private citizen has, which it can control as fully as the private citizen can his. It also has its public property, of which its citizens have the use and enjoyment, but which its own citizens cannot appropriate; such as its public buildings and grounds, and as to which the citizens of other States have the same right of user and enjoyment, but not of appropriation. The State also holds a third class of property, such as its floating and embedded fish, as to which there can be no use or enjoyment, except in appropriation; and when the right of user by appropriation is given by the State to its own citizens, the Federal Constitution secures the same right of user by appropriation to the citizens of the other States.

7. That the Constitutional provision applies to tangible property as well as to incorporal privileges, where the right to use or appropriate tangible property held by the State is conferred upon all its citizens.

8. That if the right of planting oysters when it is given to the citizens of a State, is not secured to the citizens of other States, by the word "privilege," in the Federal Constitution, any punishment for planting them is excluded by the word "immunity."

The authorities for these conclusions, are:

Paul vs. Virginia, 8 Wall., 180.
Ward vs. Maryland, 12 Wall., 418.
Slaughter House cases, 16 Wall., 36.
Moody vs. Arnold, 1 Halsted, 1.
Martin vs. Waddell, 16 Peters, 410.
Smith vs. State of Maryland, 18 How., 71.
Den vs. Jersey Co., 15 How., 432.
Pollard's lessee vs. Hagar, 3 How., 212.
Somerset vs. Fogwell, 5 Barn. & Cress., 883.
Bagot vs. Orr, 2 Bos. & Pull., 472.
Watson vs. Sampson, 8 Cush., 347.
Lakeman vs. Burnham, 7 Gray, 437.
Peck vs. Lockwood, 5 Day, 22.
Preble vs. Brown, 47 Maine, 286.
Smith vs. Levinus, 8 N. Y., 472.
Home vs. Richards, 4 Call., 441.
2 Blakstone's Com., 39.
Chapman vs. Miller, 2 Speers, 783.
Wiley vs. Parmer, 14 Ala., 647.
Crandall vs. State, 10 Conn., 343.
Campbell vs. Morris, 3 Harr. & McHen., 553–4.
Commonwealth vs. Milton, 12 B. Mon., 219.
Cooley's Story, sec. 1930, 1934, 1937.

II. We further maintain that the said legislation of Virginia is in conflict with the third clause of the 8th section of the 1st article of the Federal Constitution, which confers on Congress the power "to regulate commerce with foreign nations and among the several States."

The law of Virginia applies as well to oysters brought from a sister State, as to those bought in Virginia and planted there. As to such foreign oysters, at least, this law is a regulation of commerce, in conflict with the commercial regulations already enacted by Congress. It is in conflict with the laws of the United States relating to the coast trade,

because those laws give to all citizens of the United States the same rights of traffic and intercourse. A statute which prevents a citizen of Maryland from devoting property to such uses in Virginia as any Virginian can devote similar property to, is a regulation of commerce, whether the property be brought from Maryland or be purchased in Virginia. A citizen of Virginia can purchase a cargo of oysters in Maryland or in Virginia, and plant them in the waters of Virginia. A citizen of Maryland, if he purchases a cargo of oysters in Maryland or in Virginia, cannot plant them in the waters of Virginia. Here is not only inequality, but an interference with the exclusive commercial authority of Congress.

Cooley's Story, on the Con., vol. 2, from page 2 to 23.
Welton vs. The State of Missouri, 1 Otto, 275.

RO. OULD,
For Appellant.

THE ARGUMENT

OF

OULD & CARRINGTON,

IN THE

Supreme COURT OF ~~APPEALS OF VIRGINIA~~ the United States

ON

The Constitutionality of the Oyster Laws of the State of Virginia.

~~JANUARY, 1880.~~

IN THE

SUPREME COURT OF APPEALS OF VIRGINIA.

McCREADY vs. COMMONWEALTH.

James W. McCready, a citizen of Maryland, was indicted in two cases in the county court of Gloucester for planting oysters in the waters of Virginia, he being not a citizen thereof, found guilty and fined $500 in each case. The second indictment was framed under the 22d section of the act of April 19th, 1874, which declares that "if any person (other than a citizen of this State) shall take or catch oysters or other shell-fish in any manner, or plant oysters in the waters thereof, he shall forfeit five hundred dollars," &c.

There is but one question before the court. It is whether the Legislature of Virginia can, under the constitution and laws of the United States, impose a penalty on a citizen of Maryland for the act of planting oysters in the navigable waters of this State, while, at the same time, it permits its own citizens to do the same thing without any penalty.

It is not a question whether the Legislature can prohibit non-residents, or citizens of other States, *from taking* or *catching oysters* in the navigable waters of the State, but whether it can prohibit a citizen of Maryland from *planting* oysters. To our conception the two things are entirely different, though in so saying we do not mean to be understood as admitting that the Legislature can prohibit a citizen of Maryland from taking or catching oysters, if the same is left freely open to the citizens of Virginia.

Nor is this a question whether the State of Virginia can grant a right of several or exclusive fishery in navigable waters to one of its own citizens, or to a citizen of another State. We might safely concede this latter right, as well as the right to prohibit taking and catching by non-residents, without any damage to the positions maintained by the appellant in this case.

It perhaps may be well to trace to first principles the authority and dominion of the State over its navigable waters.

By the common law of England, all the subjects of the king had a common and general right of fishing in the sea, and in all bays, coves, branches and arms of the sea, which in general is held to extend to all places where the tide ebbs and flows; and of this right they cannot be lawfully deprived even by a grant of the king, especially since the time of Magna Charta. Wherever there was a several fishery in England, it was a claim by prescription, arising, or presumed to have arisen, prior to Magna Charta. Apparently, for this reason of prescription, we have in this State private or shore-fisheries, as distinguished from a common fishery.

While the king, at common law, was held to be the owner of the soil under the sea and navigable rivers, such ownership was held to be not at all inconsistent with the common right of all his subjects to fish in them. The king took this right of soil in trust for the public, so far as fishing was concerned; and although the king should grant away this right of soil to another; yet his grantee took it subject to the same trust.

However comprehensive the terms of the king's grant might be, the public, his subjects, could not be deprived of their common right. The distinction between the jus privatum of the crown and the jus publicum of the people is strongly stated in all the English authorities bearing upon this subject. The king's prerogative extended to the dominion and control of the shores of the sea and the beds of navigable or royal rivers, as a power held in trust for the security and protection of the public rights of navigation and fishery. Such dominion and control, subject to such trust, were among the regalia or incidents of sovereignty, which could not be alienated by a royal grant alone, or indeed held by a subject. These regalia centred in the king for the conservation of the public use.

This common right of fishing was a common law right, extending to the English colonies generally. It included the right to take shell

fish from the soil as well as floating fish from the water, inasmuch as both kinds had the common condition of being nourished and kept alive by the water.

We do not dispute that all the right of dominion and controlling power over navigable rivers and tide-waters held by the King of England or by Parliament, or by both, when relinquished by the parent country, vested in the several States in their sovereign capacity respectively, and was not transferred to the United States, even upon the adoption of the Federal constitution. The general jurisdiction remains with the several States, subject, however, to the Federal constitution, and especially to that provision of it which relates to foreign and domestic commerce. We do not dispute that the ownership of the soil below water mark is in the State on whose maritime border and within whose territory it lies, and that such soil is the subject of the exclusive propriety and ownership of that State. But yet the soil is held by the State not only subject to, but in trust for, the enjoyment of certain public rights—among which is the common liberty of planting shell fish or of taking floating and other fish of all kinds. We admit the State's ownership of the soil, its legislative jurisdiction over it, and its duty to preserve unimpaired those public uses for which the soil is held. We admit that the Commonwealth holds all the power which exisists anywhere to regulate and dispose of the sea-shores and tide-waters and all lands under them, and all public rights connected with them, whether this power be traced to the right of property or the right of sovereignty as its principal source—in trust, however, for the best interests of the public for commerce, navigation and fishing, and for all the legitimate and appropriate uses to which it may be made subservient, subject to the provisions of that Federal constitution to which Virginia herself was a party. Nor do we deny the right of the States severally to regulate the modes of the enjoyment of the public rights of fishery, so as to prevent the destruction of or injury to the fishery itself. It may forbid all such acts as would render the public right less valuable or destroy it altogether. We are willing further to admit that but for the provisions of the Federal constitution, the power, dominion and authority of the State is so plenary it could exclude from the privilege of fishing in her waters all persons who were not her own citizens.

With these admissions we suppose there will be but little controversy between us and the Commonwealth, except as to the legal effect of the

constitutional provisions to which we refer. That we have fully and accurately stated the law in the premises, we refer to—

Moody vs. Arnold, 1 Halstead, 1.
Martin vs. Waddell, 16 Peters, 410.
Watson vs. Sampson, 8 Cushing, 347.
Pollard's lessee vs. Hagar, 3 Howard, 212.
Somerset vs. Fogwell, 5 Barn & Cress., 883.
2 Blackstone's Com., 39.
Smith vs. State of Maryland, 18 How., 71.
Lakeman vs. Burnham, 7 Gray, 437.
Den vs. Jersey Co., 15 How., 432.
Peck vs. Lockwood, 5 Day, 22.
Preble vs. Brown, 47 Maine, 286.
Bagot vs. Orr, 2 Bos. & Pull., 472.
Smith vs. Levins, 8 N. Y., 473.
Home vs. Richards, 4 Call, 441.

Most if not all the foregoing decisions hold that there is no distinction between floating fish and oysters, so far as the rights of the public are concerned. The only authority we have been able to find where a contrary view is suggested, is the dissenting opinion of Justice Thompson in Martin vs. Waddell, 16th Peters.

First. Is the law of Virginia, imposing a penalty upon a citizen of Maryland *for planting oysters*, in conflict with that provision of the Federal constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?" We have already seen in what relation the State stands to its own citizens in respect to the common right of fishery, to wit: that the Legislature may regulate fisheries by prescribing the modes, &c., of catching fish, the kind of seines, the time of the year for fishing, and may otherwise direct how the common right may be exercised and enjoyed, but that it cannot prohibit the exercise of this right, which is common to all the citizens or people of the State. But, really, it is not material to inquire whether Virginia could by a legislative enactment deprive her own citizens, or any portion of them, of the privilege or right of planting or taking oysters in her waters. She has not seen fit to attempt to do so. On the contrary, by the first section of the act of April 18th, 1874, which is only a continuation of the same legislation almost time out of mind, she declared that "all the beds of the bays, rivers and creeks and the shores of the sea within the juris-

diction of the Commonwealth" might be "used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shell-fish, subject to the reservations and restrictions" imposed by the act. Although the word planting is not specifically used, it is included in the phrase "purpose of fishing." Besides, even if the privilege of planting was not given by such legislation, it existed unquestionably at common law and as of common right to her own citizens and has never been taken away by legislation. All of her citizens have always had and enjoyed the unrestricted right, without charge, of planting oysters in any part of her waters, except where she has granted a limited, exclusive right to riparian owners. By the 6th section of the act of 1874, an exclusive right to the extent of one half-acre is given to the owner or occupier of land who has a water-front thereon suitable for planting oysters. No license tax is required for the privilege of planting, either from him who exercises the common right or the exclusive privilege. The planted oysters are assessed and taxed like other property.

By the twenty-second section of the act of 1874, the section under which the indictment in this case was found, it is enacted that "if any person other than a citizen of this State shall take or catch oysters or other shell-fish in any manner or plant oysters in the waters thereof, he shall forfeit five hundred dollars," &c. It thus appears that both by common law and State legislation all the citizens of the State have the right to use as a common, for the purpose of fishing and of taking, catching and planting oysters, the beds of the navigable rivers within the Commonwealth.

It will be observed that the twenty-second section imposes a penalty on planting. The indictment follows the language of the statute and charges the defendant with planting oysters, and that alone. Planting is completed just as soon as the oysters are deposited in the bed of the river, with the intent that they should there remain until they should increase and fatten to a size which should make them acceptable to the market. The offence is completed just as soon as the act of depositing is completed with such intent. The twenty-second section goes, indeed, beyond that offence, and declares that if any non-resident, although he did not intend at the time of the deposit to let the oysters remain until they were fattened, but only proposed to let them remain until he made up his cargo, should allow them to remain more than sixty days, he should be subject to a fine of five hundred dollars. The indictment does not seem to be drawn under this latter branch of the section, but

under the first clause. If, indeed, the offence committed by McReady was under the latter branch of the statute, or if the only offence punishable under the statute is the one included under said latter clause, then this indictment is radically defective in not averring that the oysters were allowed to remain so laid down more than sixty days. But, admitting that the indictment is founded on the first clause, and not on the second, it is clear that the offence, if any, is complete, just as soon as the oysters are deposited with the intent that they should remain until they are fattened. It seems that, according to oystermen's phraseology, depositing is different from planting, and this distinction is to some extent recognized in the law of 1874. A non-resident is allowed to deposit oysters until he makes up his cargo, provided he does not allow them to remain longer than sixty days. If he allows them to remain more than sixty days they shall be deemed to have been planted. But *any* depositing by a citizen of another State is planting, within the law, unless it comes within the exception as to oysters "purchased for sale and laid out as purchased until he has purchased his cargo."

But whether planting oysters be complete or not when they are deposited, it is very certain that the act of planting is very different from taking or catching them. The act of planting cannot be made unlawful because it includes the right to take, or even because it includes the right to use the bed of the river for the purposes of increase. Planting is independent of both of these acts, and could be fully exercised, even if it was admitted that the State had perfect right to the oysters when planted. The right to plant does not involve necessarily a denial of the ownership by the State over the thing planted.

It perhaps might be contended that oysters imbedded in the soil of navigable rivers are the property of the State and that as such any appropriation of them could be limited to the citizens of the State; that the taking of them was matter of grace or gift and not of right, and that therefore the State could discriminate as to the objects of her charity. But no such pretence can be set up in the matter of planting oysters. Before they can be planted they must become the private property of the person who proposes to plant them. Under our laws, any one, native or foreigner, can purchase oysters anywhere within the State and own them as his property. After such purchase, and while they are his property, and when the State has no sort of claim upon them, the law declares he shall not do with them what it allows the citizens of the State to do. The case of planting is therefore at the least free from the objection of the proprietorship of the State which

might be urged if the question were the right to take from the bed of the river. Planting presupposes the dispossession of any right or title of the State in and to the oysters proposed to be planted, and concedes the exclusive ownership of the party who proposes to plant. The course of business and trade upon our navigable waters is in accordance with this view of the case. Citizens and foreigners for many years have been in the habit of purchasing from those who catch, and then either transporting the cargoes thus made up or planting them in order to insure their increase. The case then stands thus: A citizen of Virginia having oysters which he has purchased from catchers on his vessel is at liberty to plant them, while a citizen of Maryland, in the same situation, is to be punished if he does the same act. The part of the law we are considering does not impose the penalty upon taking up the oysters after they have been planted, but upon the planting. The offence is complete after the oysters are planted, whether they are taken up or not. Indeed, if they should be taken up by the party who planted them, such act would be an offence against another part of the statute. By no proper construction can the act of planting be made to include a subsequent taking up of the oysters, or even the right to take them up. It cannot, therefore, be laid to the charge of the appellant that he has, by the act of planting, in any manner interfered with the proprietary rights of the State, original or acquired.

We do not deny the police power of the State. If it could be shown that the planting of oysters was injurious to the health of the people of the State, or was destructive to the oyster fishery, or impaired its excellence, this unquestioned police power of the State might be invoked. But the mere fact that the prohibition extends only to the foreign citizen and not to the home citizen is proof that it is not founded upon the police power. Police laws operate upon all alike. No one can seriously contend that this is a bona fide exercise of police power. The object is not to prevent the planting of oysters, but to prevent the planting of oysters by non-residents. The character of the act is not determined by its inherent qualities, but altogether by the the citizenship of the party who does the act. In the exercise of a police power, the test is always to be found in the nature of the act forbidden.

The clause in the Federal constitution to which we have referred has been considered by the Virginia Court of Appeals in two comparatively recent cases—Slaughter's case, 13 Gratt., 767, and Baker vs. Wise, 16 Gratt., 139. In the former case it was decided, as was afterwards ruled by the

U. S. supreme court in Paul vs. Virginia, that the word citizen did not include corporations. But there is not a word in the case which intimates that a higher license could be required of a citizen of another State than from a citizen of Virginia. It was held in that case that the privileges and immunities guaranteed to citizens of the States of the Union are annexed to their status of citizenship—a rule which we do not pretend to controvert.

In Baker vs. Wise, 16 Gratt., 139, there is an elaborate discussion of the subject, both by counsel and court. Nothing is to be found in Judge Daniel's opinion which militates against the pretensions of the appellant in this case. On the contrary, there is much to be found which supports his case. On page 218 he admits that all the property in the State, whether owned by its own citizens or the citizens of other States, is entitled to its protection. But in that case the law made no distinction betwen the resident and non-resident in respect to the penalties attached to its violation. The only difference in its treatment of resident and non-resident consisted in adopting a measure of preventive justice in respect to the vessel of the non-resident, which it dispensed with in the case of the vessel of the resident owner. The principle asserted in the case was that there was "no injustice in adopting a greater degree of vigilance in respect to the property of citizens of other States than is observed in respect to the like property owned by citizens of this State, if there is greater danger or reasonable grounds for the apprehension of greater danger to the safety of the public from the presence of such property in the one case than in the other." Pursuing the course of other judges in not attempting to give an enumeration of the privileges and immunities secured by the clause in the constitution, Judge Daniel says there are privileges and immunities belonging to a citizen which do not attach to the citizens of other States. This we do not dispute. We only contend that the foreign citizen is entitled only to such rights of the home citizen as spring out of citizenship. This right of the foreign citizen is admitted in Judge Daniel's opinion, and the distinction between the privileges and immunities which flow from citizenship and those derived from residence was vigorously pressed by the Attorney General in that case. He uses this language, speaking of the provision in the Federal constitution: "It lifts from the citizens of other States the incubus of alienage. He cannot be treated as an alien; he must be treated as a citizen. All disability that attaches to alienage is forbidden; all privilege that attaches to citizenship (merely) is secured. When in other respects the citizen

of another State stands on the same platform with a citizen of Virginia, she cannot deny the citizen-right to the one which see allows to the other." Applying this restricted view to the case at bar, it is at once manifest that the legislative provision which we are attacking is in violation of the Federal constitution. We have already seen that Virginia holds the beds of her navigable rivers under both the common and statute law in trust for her citizens; that while she may regulate their use, she cannot destroy the common right of her citizens to their asufruct; that her title to and dominion over these beds is not like the ownership of a private individual over his private estate. The common right of fishing belonged to the English subject as such; he held this right and was entitled to its enjoyment in return for the obligations which his allegiance imposed on him. So as to the citizens of the several commonwealths in this western world. As citizens, they become entitled to the same rights which pertained to English subjects. This common right, subject unquestionably to regulation for its preservation, belongs to them as citizens, and would follow their persons as long as they continued citizens, wherever they might be. It follows from this trust relation and its inviolability, that the common right belongs to the citizen as such, and by the operation of the constitution is transferred to the citizens of the other States. If there be anything clear in this matter, it is that by the common law, as well as by our statute law, the right of a citizen to participate in the benefits of navigation and fishing belongs to him as a citizen and independently of any other qualification. And if so, then the argument of the Attorney General in Baker vs. Wise proves our case. We say again, we have no quarrel with anything that was said by the court in that case. If it had decided that a citizen of Massachusetts could be fined and imprisoned for an act which was declared to be no offence on the part of a Virginian, it would have been against us. But no such view was announced, or could be, if the constitution is to be respected. The court only decided that the police power of the State was rightly exercised in requiring a search to be made of vessels owned by citizens of the Northern States.

We will now proceed to refer to the cases wherein the meaning, force and scope of the constitutional provision have been discussed.

One of the earliest cases is Livingston vs. Van Ingen, 9 Johnson Rep., 507. At page 561, Judge Yates says: "To all municipal regulations, therefore, in relation to the navigable waters of the State, according to the true construction of the constitution, to which the citizens of this State are subject, the citizens of other States, when within

the State territory, are equally subjected; and until a discrimination is made, no constitutional barrier does exist. The constitution of the United States intends that the same immunities and privileges shall be extended to all the citizens equally, for the wise purpose of preventing local jealousies which discriminations (always deemed odious) might otherwise produce." Chancellor Kent, in the same case, page 577, says that the constitutional provision "only means that citizens of other States shall have equal rights with our own citizens, and not that they have different or greater rights. Their persons and their property must in all respects be equally subject to our law."

See Lemmon vs. The People, 20 N. Y., 607.

Judge Denis, at page 608, says: "In my opinion the meaning is, that in a given State every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of the particular State would be unlawful." Judge Wright, in the same case, at page 626, says: "The provision was always understood as having but one design and meaning, viz—to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens. A citizen of Virginia coming into New York was to be entitled to all the privileges and immunities accorded to the citizens of New York. He was not to be received or treated as an alien or enemy in the particular sovereignty." Mr. O'Connor, in his argument in that case, had contended that by virtue of the constitutional provision a citizen of Virginia could carry his slave-property into New York for the purposes of temporary sojourn, without being deprived of it.

See Commonwealth vs. Towles, 5 Leigh, and Judge Parker's opinion on pages 748–9.

Paul vs. Virginia, 8 Wallace, and Justice Field's opinion on page 180.

Ward vs. Maryland, 12 Wall., and Justice Clifford's opinion on page 430.

Chapman vs. Miller, 2 Speers, and Judge Butler's opinion, page 783.

Wiley vs. Parmer, 14 Ala. 647, in which Chief Justice Collier said the object of the Federal provision "was to secure to the citizens of all the States the peculiar advantage of acquiring and holding real as well as personal property, and to provide that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected."

In Crandall vs. State, 10th Conn. 343, Chief Justice Daggett says: "The plain and obvious meaning of this provision is to secure to the citizens of the States the same privileges as are secured to our own by our own State laws."

Campbell vs. Morris, 3 Harris and McHenry, p. 553-4.

Commonwealth vs. Milton, 12th B. Monroe, p. 219. Judge Marshall in that case says: "The Constitution certainly intended to secure to every citizen of every State traversing at will the territory of any and every other State, subject only to the laws applicable to its own citizens, the right of exercising there freely but innocently all of his faculties of acquiring, holding and alienating property as citizens might do, and of enjoying all other privileges and immunities common to the citizens of any State in which he might be present, or in which, without being present, he might transact business."

See Cooley's Story, 2d volume, sections 1930, 1934, 1937. He says it forbids "distinctions under laws establishing public schools, preemption laws, exemption laws, and the like; the rules which exclude persons from their benefits must be uniform and not partial." He further says, the right to use in common with all others the navigable waters of the United States is included.

See Slaughter-house cases, 16 Wallace, 36.

Justice Miller, speaking of this part of the 16th amendment, says, page 77: "Its sole purpose was to declare to the several States that whatever those rights are, as you grant or establish them to your own citizens, as you limit or qualify them, or impose restrictions on their exercise, the same—no more, no less—shall be the measure of the rights of citizens of other States within your jurisdiction."

See Mr. Justice Field's opinion in same case, pages 100, 101.

Inasmuch as the true construction of this constitutional provision is a Federal question, it is peculiarly appropriate to refer to the decisions of the United States Supreme Court in which it has been interpreted, because as to such a question that court is appellate to this. This court (I speak it with all deference and respect) is bound, not merely to be persuaded, by the decisions of the United States Supreme Court on

Federal question. The two recent decisions bearing directly upon this subject are Paul vs. Virginia, 8 Wallace, 180, and Ward vs. Maryland, 12 Wall. 418. Let us endeavor to test this case by the declarations of the Supreme Court in the former case, Paul vs. Virginia. The court there said: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with the citizens of those States, the Republic would have continued little more than a league of States; it would not have constituted the Union which now exists. But the privileges and immunities secured to citizens in the several States by the provision in question are those privileges and immunities which are common to the citizens in the latter State, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision."

Does not the law of Virginia, prohibiting planting to any other than a citizen of the State, come within not only the general object stated in the foregoing opinion, but within every clause of the subdivisions or specific enumerations? For the sake of the argument, at least, we admit that the privileges and immunities referred to are those and only those which spring from citizenship. Have we not already established that the common right of fishing, including the right to plant oysters, is given or reserved to the citizens of Virginia, by both common and statute law, by virtue of their citizenship? Their right flows from that and that alone. As every subject of Great Britain, wherever he might live, whether in India or the Cape of Good Hope, had the right to fish in the waters of England, so every citizen of Virginia, wherever located, by virtue of his citizenshp, can fish in her waters. At common law it was so, and the statute, instead of altering it or attempt-

ing to alter it, has confirmed the right. The phrase "by all the people *of* the State" in the first section of the law is the same in legal effect as if it had been written by all the citizens of the State, for all the people of the State are the citizens of the State. The phrase in the twenty-second section, "other than a citizen of this State," is still more conclusive. The right is there reserved to the citizen and denied to any one who is not a citizen. If, then, the right of fishing belongs to the citizen as such and is denied to all but such, is it not manifest that the right in Virginia flows, or, to use the language of the Supreme Court, results from citizenship? The right of fishing in Virginia does not flow from mere inhabitancy, or *pedis possessio* within the State, for if this were true M'Cready was no offender. He was and must have been within the State when he planted.

Can it be doubted on the other hand, but that a citizen of Virginia, owing his allegiance to her, but inhabiting, for the purpose of trade, another State, would have the right to fish in her waters? He is one of the people of the State and as long as he owes his allegiance to the State Virginia can put her commands upon him, though temporarily inhabiting a differest sovereignty. If so, upon what principle except that of citizenship? Descending from the general statement to the particular enumeration of Mr. Justice Field, we have the phrase "relief from the disabilities of alienage in other States." What was the disability in this connection under which the alien labored? The same disability that the alien at common law labored under, to wit: he could not fish in English waters; and as soon as he lost his character of alien and became a citizen he could enjoy the common right of fishing. When, therefore, a citizen of Maryland comes to Virginia without the disabilities of alienage, what is there to prevent his right of participating in the privileges of citizens? The next clause in the enumeration is, that the Federal provision "inhibits discriminating legislation against them by other States." The Virginia law is directly in the teeth of this, both in its letter and spirit. The next is "it gives them the right of free ingress into other States and egress from them." The case at bar is not in conflict with that enumeration. The next is the most important enumeration of all, and is substantially found in every enumeration of the rights conferred by this clause of the constitution, including that of Judge Washington in Corfield vs. Coryell, to wit: "It insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness." And, here we beg leave to remark

that if the case before Judge Washington had been one of planting and not taking, and he had been bound by his own declaration as to the true meaning of the constitutional provision, he would have been obliged to have decided in favor of the accused. McCready had on board his vessel what was unquestionably his own property—property recognized as such by ~~xxx~~ State laws, property which he had acquired in accordance with State laws. The State put forward no sort of claim to it; it was McCready's, and his alone. If he had been a citizen of Virginia he would have had the right to plant his oysters. The law permitted it if it did not encourage it. The privilege of planting the oysters was a right which belonged to that species of property in the hands of a Virginian. It was one of his permitted methods of enjoying that property and its benefits. Now, if, in the language of the Supreme Court, the constitutional provision gave to the citizen of Maryland the same freedom possessed by the Virginian in the acquisition and enjoyment of property, why must not the former be permitted to do with it just what the latter was allowed to do with the same kind of property? The right to acquire, hold, dispose of and enjoy property includes the right to put it to every available use, or, at least, to just as many available uses as other people in the same circumstances would be allowed to put it. The court will at once see the distinction between this case, which involved the enjoyment of McCready's private property alone, and the case before Judge Washington, which involved the right of the accused to appropriate to his own exclusive possession what was owned and held by the State for public use.

The last enumeration of Justice Field is, that the provision "secures to them in other States the equal protection of their laws." In other words, where the law of a State gives to its citizens a certain protection to their private property, the same rule shall prevail as to the private property of citizens of other States found within its territorial limits. If the State law gives or confers any valuable incident or appurtenance to the property of its citizens—such, for instance, that it may be used or employed in such a manner as to give it increased value, or a new value—the law enures to the benefit of the citizens of other States having property within the State limits, and they can claim, by virtue of the constitutional provision, "the equal protection of the law." If this last enumeration of Justice Field does not mean this, it means nothing. The same phraseology has been incorporated in the 14th amendment. It is true that in this opinion the Supreme Court says the privileges and immunities secured are those which are common to the

home citizens, under their constitution and laws, by virtue of their being citizens. We do not dispute this limitation. We have already admitted it. We have heretofore endeavored to show, and we hope we have succeeded, that the right of the citizens of Virginia to plant oysters inheres in them as citizens, just as it inhered in the people of England, as far as its waters are concerned, by virtue of being subjects. All of the enumerations of Justice Field are privileges and immunities which flow from citizenship, and are so stated in his opinion; and we have shown that all of them, or at least nearly all, embrace the case at bar. Some privileges flow from citizenship and some from inhabitancy, permanet or temporary—some, perhaps, from both citizenship and residence. But we think it can be safely stated that if there are certain privileges and immunities which are common both to citizenship and residence; that if there are privileges and immunities that belong alike to the citizen or the resident, it is false reasoning to restrict those privileges and immunities to residence or inhabitancy alone. In other words, by showing that a certain privilege pertains to a person as an inhabitant or resident, it is not shown that he is not entitled to the same privileges as a citizen. There are many privileges which are common both to the citizen and resident. Either can claim them. The possession by the inhabitant or resident is not an ouster of the citizen. It will not do, therefore, for the Commonwealth to show that residents, by virtue of their residence, are entitled to this right, even if it could, without also showing that citizens, as such, are not entitled to it. There are laws on our statute-book which require actual domicile in addition to citizenship as a qualification for certain privileges. In such cases citizenship is not enough, but there must be superadded to it actual residence. We admit that as to such privileges, where something more than citizenship is required as a qualification, the constitutional provision does not apply. But where the privilege or immunity is conferred upon the citizen *or* the resident, the provision does apply. The privilege of the citizens of the foreign State is not ousted, because the home State has conferred the same privilege not only upon its citizens, but also its residents.

The more recent case of Ward vs. Maryland, 12 Wallace, 418, is more in point than that of Paul vs. Virginia, though the argument is no fuller than in the latter case. It was decided in Ward vs. Maryland that a State license-tax which discriminated against commodities which were the productions of other States was void because it abridged the privileges and immunities of citizens of such other States. Mr. Jus-

tice Clifford, in defining the phrase privileges and immunities, says: "Beyond doubt, these words are of a comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation, to acquire personal property, to take and hold real estate, to maintain action in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

Most of what we have said in commenting on Paul vs. Virginia applies to these observatians of Mr. Justice Clifford. The citizens of other States are protected while engaged in lawful commerce, trade or business. That commerce, trade or business is lawful which the States permit to their own citizens. Such is the character of the oyster trade or business, including both planting and taking. McCready was as much entitled to protection by the constitutional provision in this trade or business as a citizen of Virginia engaged in the same business. It was a part of the legitimate oyster trade or business to dump or plant oysters in the navigable waters or their beds for the purpose of increase —a trade or business in which citizens of Virginia, under the protection of the State law, were daily engaged. Yet the same State law, while it encouraged the citizen of Virginia in this trade or business, denounced the same act when done by a citizen of Maryland, and only because he was a citizen of Maryland. Can such discriminating legislation stand, if the object and purpose of the Federal law be, as the Supreme Court has declared it, to protect the citizens of other States engaged in lawful commerce, trade or business? This opinion of Mr. Justice Clifford follows all others in deciding that the constitutional provision secures to the citizens of other States the "right to acquire personal property." The right to acquire personal property includes the right to hold it on the same terms as others, to use it and transfer it on the same terms, for without these incidents the right to acquire is valueless. To say that a man may acquire property and not use it, subject to the same limitations as others in like situation, is a mockery.

Mr. Justice Clifford says it also includes the right to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. The same principle, if not the words used, would prevent any greater burden to be imposed. Accordingly, while the State permitted its own citizens to plant oysters without charge, it could not impose a tax upon the foreign citizen in the exercise of the same act.

And if the State could not impose a tax, of course it could not prohibit. If the foreign citizen is relieved from a higher charge than is imposed on the home citizen, he is, a fortiori, relieved from a prohibition.

In Ward vs. Maryland it was decided that Ward, the defendant, "might lawfully sell or offer, or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents." Does not the principle of that decision control this?

The Supreme Court, in the same case, says that "the supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to citizens of the other States. Inequality of burden, as well as want of uniformity in commercial regulations, was one of the grievances of the citizens under the confederation, and the new Constitution was adopted, among other things, to remedy those defects in the prior system." The "inequality of burden" can be just as effectually imposed by prohibiting one of the uses to which property is applied by the home citizen, as by making it subject to a tax—and, indeed, more so, because the prohibition might utterly destroy the value of the property, while the tax would not. It must be admitted by every one that if a tax had been imposed upon a non-resident for planting oysters, while the citizen of the State was free from the tax, the case would be within the express and direct ruling of the Supreme Court in Ward vs. Maryland. Is a prohibition less obnoxious to the Federal provision than a mere charge or tax? Surely no such view as that can be sustained.

It is proper to observe here, whilst we are commenting on the case of Ward vs. Maryland, that the statute of the State forbade any person, "*not being a permanent resident of the State,*" to sell by sample, &c. Yet the court treated the phrase "not being a permanent resident of the State," as meaning the same as not being a citizen of the State. In other words, the court held that a tax upon a person who was not a permanent resident of the State, while all others were untaxed, was a discrimination against citizens of other States, and, as such, within the inhibition of the constitution—that under such a provision of the law, wherein the word "citizen" was not used, the citizens of other States were denied the privileges and immunities of a citizen of Maryland, within the meaning of the constitution. It is not essential that a

State law claimed to be obnoxious to the constitutional provision shall limit a privilege to its own citizens *eo nomine*. The case of Ward vs. Maryland is full and complete authority for that position. It is enough if the effect and operation of the law is to deny to citizens of other States such privileges of the home citizen as the constitutional provision was intended to protect. Hence, when the class legislated against in Maryland was termed persons "not being permanent residents of that State," the phrase, in legal effect, was treated as if it had been, not being citizens of that State. In other words, a law which limited the privilege of selling to "permanent residents," or which denied it to persons "not being permanent residents," raised the question of the rights of general citizenship under the clause in the Federal constitution. The legal effect of the Federal provision was not to be nullified or evaded by a phrase in which the word "citizen" was not employed, when the mischief of the State law was within the meaning of the constitution. Hence, not even in the argument of the attorney-general of Maryland was it attempted to be shown that the law turned upon residence and not upon citizenship, or that the discrimination was justified on the ground that it was based upon want of actual residence instead of want of citizenship. In the judgment of the Supreme Court a tax based upon want of permanent residence is a tax based upon lack of citizenship. In the case at bar the discrimination is founded upon lack of citizenship *eo nomine*.

We have thus endeavored to show that the right of the citizens of other States to plant oysters in the navigable waters of Virginia is not only within the principle of cases decided by this court ~~which stands as appellate to this court in questions of that nature~~, but is within the express language of that court in announcing its determinations. But doubtless we will be referred to another case decided by a Federal tribunal, in which it will be urged there is a more direct adjudication of the question now before the court. We refer to the case of Corfield vs. Coryell, reported in 4th Washington 371. We have several things to say about that case, to which we ask the patient attention of the court:

1st. It was not the decision of ~~a~~ this court, ~~which is appellate to this in any case~~. At best it is but persuasive authority, while Paul vs. Virginia and Ward vs. Maryland are controlling. It was the ruling of a circuit judge, who, however eminent he was, could not bind this court by his construction of the Federal provision.

2d. It was not a decision of the right of a non-resident to plant

oysters, but of his right to dig or dredge for them, and that, too, at a period of the year when it was unlawful for both citizen and non-resident to gather them.

3d. The law of New Jersey did not prohibit non-residents as such from fishing, but only required that the non-resident should fish from a vessel owned by a resident. It imposed the duty upon a non-resident of fishing from a vessel owned in the State, and therefore, in a certain sense may be said to have been a *regulation* of the non-resident right, which possibly may have been within the police power of the State. At least, the State law did not prohibit the non-resident right.

4th. There are certain principles and maxims announced by Judge Washington in his opinion which determine the case at bar in favor of the appellant, at least, so far as his right to plant oysters is concerned, even if they do not go further and determine the right of a non-resident to take and catch oysters. Thus, he says, in his enumeration of the privileges and immunities conferred upon the citizens of other States by the Federal provision, that the right "to take, hold and dispose of property, real or personal," is included. If this be so, did not McCready have the right to hold and dispose of his property in as full and complete and satisfactory manner as the citizen of Virginia? How could McCready be said to enjoy the right of holding and disposing of his property, if it was denied to him to do the same thing with his property which the citizen of Virginia was allowed to do? The whole value of property consists in the advantageous manner in which it can be used. To take away its advantageous use, is to destroy the property itself, and thus substantially to enact that a certain thing shall be property in a citizen's possession and not property in the hands of a citizen of another State temporarily residing here.

The opinion of Judge Washington does not controvert the right of the non-resident to hold and enjoy his property as do the citizens of the State the like property. Indeed, he fully asserts it, and bases his decision against the right of the non-resident to *take* or catch oysters on the alleged fact that the oysters are not his property, but the property of the State. While, therefore, Judge Washington's assumption and reasoning required him to decide against the right of the non-resident to take the property which did not belong to him, the very same reasoning would have compelled him to decide in favor of the right of the non-resident to plant, when it was shown that he was the owner of the oysters which he proposed to plant.

Judge Washington also says that "an exemption from higher taxes and impositions than are paid by the other citizens of the State," is guaranteed by the Federal provision. We have already seen that such a privilege or right covers the case at bar. He also says that the privileges and immunities intended to be secured by the Federal Constitution are fundamental in their nature. We are not disposed to gainsay this, although men might quarrel indefinitely as to whether a certain named privilege or right was fundamental or not. The word does not, probably, convey the same definite meaning to any two minds; and it is very doubtful whether the whole matter is made any plainer by the use of the word in that connection. If the right to use a person's property as other people use the like property is a fundamental right, why is not the right of a person to plant his oysters, when other people are allowed to plant theirs, also a fundamental right? When people get into logical trouble they are apt to use a phrase, or a word, it may be, as the ancient gods in the Homeric battles did the clouds, as a cover of darkness. But, as we have said, we have no quarrel with "fundamental," especially if it means what we suppose it does. We accept the limitation, if it really gives any.

Judge Washington says that "he cannot accede to the proposition, that under the provision of the Constitution the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the Legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own citizens." We trust we may be permitted to say, and that too with all becoming modesty, that we do not understand what Judge Washington means if he is to be understood as declaring "that anybody contends that the citizens of the several States must participate in all the rights which belong *exclusively* to the citizens of any other particular State." For if it is once admitted that those rights belong *exclusively* to the home citizen, the whole controversy is at an end. It is a solecism to say that any one is entitled to rights which belong *exclusively* to another. We suppose Judge Washington means that the citizens of other States are not entitled to all the rights which a particular State confers upon its own citizens. And in a certain sense that is perfectly true. A citizen may acquire rights by virtue of State laws, which no foreign citizen, and indeed no other home citizen can claim as his own. Such, for instance, is the right to

vote and the right to hold office. These do not spring from citizenship, for all citizens, as such, do not have the right to vote or to hold office. Largely more than one-half of our citizens do not vote, and cannot hold office. Our women and our children cannot. The right of suffrage or the right to hold office is nowhere universal or absolute. Formerly property was a necessary qualification in this State. Were none but grown men of property citizens? Voting is not a criterion of citizenship; indeed, the one has no natural or necessary connection with the other. The right of suffrage and the right to hold office are founded in notions of internal policy, varying frequently in the same government. Sometimes one qualification is required in a voter for the upper house of the Legislature and another for the lower. It is true, perhaps, that in all cases citizenship is required as a part of the qualification, but that is not enough. There are other superadded qualifications, and from the aggregate the right flows. Actual residence, or any other qualification which the State may see fit to require, may be lawfully imposed, and as the citizen of one State cannot possibly fill the conditions which are required of a voter or office-holder of another State, the constitutional provision cannot apply to such cases. When, therefore, the privileges or rights of the home citizen flow from other qualifications than citizenship, or from qualifications superadded to citizenship, the rule of equality imposed by the Constitution requires the foreign citizen to have centered in him the same qualifications in order to possess the same right. If it were otherwise the very rule of equality which the Constitution seeks to secure would be violated.

The constitution secures to the foreign citizen all the privileges and immunities or rights which flow from citizenship alone. The phrase "privileges and immunities" is as comprehensive as rights, when taken with this limitation. And if the passage we have quoted from Judge Washington denies that the citizens of the other States are entitled to all the rights belonging to a citizen of Virginia, which spring from citizenship alone, we confidently assert that any such conclusion is contrary to both principle and authority. We have already endeavored to show that the rights of fishery in navigable waters do flow from citizenship alone—not from citizenship and something else superadded, and not from something other than citizenship. In the language of Judge Marshall, in Commonwealth vs. Milton, 12 B. Monroe, 219, every citizen of every State traversing at will the territory of any and every other State has the right to enjoy all privileges and immunities which are *common* to the citizens of any State in which he might be

present, or in which, without being present, he might transact business. How much more satisfactory and definite that word "common" is than "fundamental"!

When Judge Washington, in the latter part of the passage we have quoted, intimates that the Legislature of a State is not bound, in regulating the use of the common property of the citizens, to extend to the citizens of all the other States the same advantages that are secured to their own citizens, he concedes that the navigable rivers and their beds are the common property of the citizens of a State qua citizens, and by no other right. The principles and authorities we have invoked say, in opposition to Judge Washington, not that the Legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens, but that if a State Legislature *doe s*grant rights to its own citizens by virtue of their citizenship, and by law regulates such rights, that by force of the constitution such rights enure to the advantage of the citizens of the other States, subject to the regulations imposed upon the home citizens. The right flows to the foreign citizen by the force of the constitution—not because the State Legislature has or has not conferred it upon them, *but because the State Legislature has conferred it upon its own citizens.* The constitution takes up such a case where the State Legislature left it, and works out the right of the foreign citizen from the rights of the home citizen. The constitution never acts unless there is a right in the home citizen as such, however he may have become possessed of it; but as soon as the right inheres in the home citizen as citizen, it is tacked to the citizens of other States, and becomes theirs even against the adverse legislation of the home State.

The theory of our American constitution was, and is, that a State would never deny to its own people the benefits that pertain to free citizens. Acting upon this view, and relying for further support upon the provision guaranteeing to every State a Republican form of government, our fathers very wisely did not attempt to enumerate or define the rights of a citizen of one State in another, but left them to be determined by the action of the State towards its own citizen. The citizens of other States acquire their rights by subrogation alone. If the home citizen as such has not a specific right, then the foreign citizen has not. Thus it may be the citizen of Maryland may have rights in Virginia, which he cannot claim in North Carolina, because while Virginia has confirmed the right to her own citizen, North Carolina has not. This view is conclusive that there never can be any exact and

definite enumeration of all the rights that attach to citizens of other States, because they may and do vary just as there is a variance in the rights which flow from citizenship in the different States. This view also shows that the rights of the citizens of other States are not, in the strict sense, conferred by the Federal constitution, but are only secured to them by that instrument after having been granted by the State to its own citizens as such. But our fathers believed that this provision of the constitution, coupled with the power on the part of United States to guarantee a Republican form of goverment to the States, was sufficient to secure to the people of the several States the rights of freemen in each State.

Let us stop for a moment to inquire whose work this was. It was prominently, if not chiefly, that of Virginia. And when a citizen of Maryland claims the lawful results of such a work, he does not seek to impose on her a hardship to which she has never consented, or a burden put on her by others. Virginia, when she became a party to the Federal compact, knowing that her citizens would seek adventures in other States, determined that they should enjoy all the privileges and immunities which were common to the citizens of any State in which they might be present, or in which, without being present, they might transact business, and therefore, in the interest of her own people, gave her ready assent to and support of the constitutional provision. She purchased this valuable right to her own citizens by an agreement in her soverign capacity that the citizens of other States should enjoy, within her borders, all the privileges of her own citizens which spring from citizenship. The price was not two great for the advantages she received. But whether that be so or not, she made the agreement and it is not for her, if she could to violate her compact. Between her voice in the Federal compact and her voice in the act of 1874, if there be discrepancy, the duty of this court to pronounce in favor of the efficacy of the former is plain. This constitutional provision is not a grant of power to the general government as the agent of all the States—it is a deleberate promise upon consideration to the citizens of other States directly or to the States severally for the benefit of their citizens respectively, and every citizen of any State can claim its fulfillment. The right is no more valuable to him than it is to the Virginian. His State has paid as full a consideration for his right as Virginia did for the same privileges to her citizens. He does not crouch as a supplient, but stands a freeman—he asks no boon, but demands a right as Paul did, when in bonds at Jerusalem. When the Apostle, a citizen of Tarsus, a no mean

city of Cilicia, asserted his Roman citizenship, at the very mention, the scourge fell from the centurian's hand. Rome's matchless orator had proclaimed on the Capitoline hill that it was an offence worthy of death to scourge a Roman, and the echo of the words was heard, and heeded in the keeps of Jerusalem and in Herod's judgment-hall. The awful majesty of Rome, far swifter than her eagles, flew to Paul's succor and covered his otherwise defenceless head with its protecting shield. The record is an interesting one. Here it is: "And as they bound him with thongs, Paul said to the centurian that stood by, Is it lawful for you to scourge a man that is a Roman, and uncondemned? When the centurion heard that, he went and told the chief captain, saying, Take heed what thou doest; for this man is a Roman. Then the chief captain came, and said unto him, Tell me, art thou a Roman? He said, Yea. And the chief captain answered, With a great sum obtained I this freedom. And Paul said, But I was free-born. Then straightway they departed from him which should have examined him; and the chief captain also was afraid, after he knew that he was a Roman, and because he had bound him."

Recurring to the opinion of Judge Washington, we find that on page 381, he says that the citizens or subjects of the State "may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it that it cannot be enjoyed by others without the tacit consent, or the express permission, of the sovereign who has power to regulate its use."

Well, the people of this State were certainly not tenants in common of McCready's oysters on board his vessel, and if Judge Washington's law applied to the imbedded oysters, it certainly did not to the oysters which McCready had purchased after they were dissevered from the soil. But is Judge Washington's conclusion correct as to the imbedded oysters? It is because the citizens of Virginia are tenants in common, or rather because the State hold such property for the common use of its people, that the rights of the citizens of other States attach to it, not by virtue of the State law, but by virtue of the constitution to which Virginia has assented. Are not the people of Virginia just as equally tenants in common of all those other rights belonging to them as citizens of the State, which Judge Washington admits to belong to the citizens of other States, such, for instance, as "protection by government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind?" What is there in the common tenancy to prevent the application of the constitutional provision?

The constitutional provision applies because the people of Virginia are tenants in common. It is only in the atmosphere of a common right that the provision works; and it is a complete non sequitur to deduce an exclusive right from the common tenancy. And if it be true, as Judge Washington alleges, that it cannot be enjoyed by others than the citizens of Virginia without the tacit consent, or the express permission, of the sovereign who has the power to regulate its use, we insist that such express permission has been given in the most irrevocable form and by the most inviolable instrument. If Judge Washington means to intimate that such express permission has not been given, he is assuming as a fact the very point which is in controversy.

As we do not rest the right of the citizens of other States to plant oysters or to catch them upon principles of public law, independent of the Federal constitution, it is unnecessary for us to consider that part of Judge Washington's opinion which discusses that view. His quotation from Grotius, as to the right of a sovereign to prohibit foreigners from taking fish in his waters, is confined to a right which is untrammelled by compact.

Judge Washington, at page 382, says, "that this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that State, in express terms, to the United States, is admitted by the counsel for the plaintiff." It is very true that the rights of fishery, eo nomine, are not mentioned in the Federal provision, and we think we have satisfactorily shown why that as well as every other enumeration was omitted. But whatever may have been admitted by the counsel in Corfield vs. Coryell, we insist that by express words all the privileges and immunities which flow from citizenship, and are possessed by the citizens of any State as such, are granted to the citizens of other States. The power of a State to abridge the privileges and immunities of its own citizens and thereby to abridge the privileges and immunities in that State of citizens of other States, is not taken away by the Federal provision; but just as long as the State gives to its own citizens, by virtue of their citizenship, and no longer, any privilege or immunity, such privilege or immunity, by express cession, is conferred upon the citizens of other States. Slaughter-House cases, 16th Wallace, page 77. Chief Justice Taney, in delivering the opinion of the Supreme Court in Martin vs. Waddell, 16 Peters, in speaking of the rights of the States since the Revolution to their navigable waters and the soils under them, in connection with the rights of fishery, says, at page 410, that they hold them for their own common use, "subject only

to the rights since surrendered by the constitution to the General Government." The same doctrine is announced in Pollard's lessee vs. Hagan, 3 How., at page 229. And on page 230 of the same case, the Supreme Court says, "although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, subject to the constitution of the United States and the laws which shall be made in pursuance thereof."

Judge Washington finally dismisses the case of Corfield vs. Coryell, so far as the effect of the constitutional provision is concerned, by saying it would be going too far to construe it as amounting to a grant of co-tenancy in the common property of the State to the citizens of all the other States. In the first place we say that this is not a fair or precise statement of our position. If the Federal provision was a grant to the citizens of the other States it might be that the rights when once acquired would forever remain, without any power in the State to divest them, even when it abridged the rights of its own citizens. The more proper statement of our position, as we have endeavored to show, is that each State has granted to the citizens of other States the right to enjoy the common property of the State as fully and as long as her own citizens could enjoy it, but no longer; that this compact was mutual, each State receiving a proper consideration therefor. If this right of enjoyment amounts to a co-tenancy, then all well and good—but if it does, it only continues so long as the State continues the right of enjoyment to its own people. Judge Washington says the State has a right of property in the oysters. He denominates them as the common property of the State. In the proper sense we do not dispute this. But what is the nature of this right of property, and in what sense is it the common property of the State?

It is unquestionable that the State may hold property by different tenures and in different capacities. If it becomes a partner in any trading company it divests itself, so far as it concerns the transactions of that company, of its sovereign character and takes that of a private citizen. It holds its stock as any other stockholder would hold it. United States vs. Planters Bank, 9 Wheat., 904; Briscoe vs. Bank of the Commonwealth of Kentucky, 11 Peters, 257. As to such property the State has the same power of dominion as a private person has over his own property. Such, for instance, is the stock owned by the State of Virginia in the Fredericksburg Railroad Company or in the James River Canal Company; such, perhaps, also, the armory property in Richmond.

It owns the capitol and other public buildings and the public square

by a different tenure, and the beds of navigable rivers by still another tenure. In Smith vs. Levinus, 8th N. Y., 472, the Court of Appeals of that State said: "The people in their sovereign capacity own the beds of all navigable waters within the State. They are held for the common benefit, and to promote the convenience and enjoyment of all the citizens, and not in the manner the capitol and public buildings are owned." The vice of Judge Washington's argument, if we may be permitted to predicate a thing of so distinguished a jurist, is, that he regards the beds of the navigable rivers, and the oysters imbedded therein, as the private property of the State, with a power of disposal over the same as if it had been stock owned by the State in a corporation. Such is not the case. The State holds the beds of the rivers by even a different tenure from that by which it holds its public capitol, or [illegible]. As to them she is a trustee, with no rightful power to destroy the trust. But even if the State held the rivers and their beds by the same tenure as it holds its capitol, we ask could the State enact a law giving to its own citizens the privilege of access to the capitol and to the public grounds and deny it to a citizen of another State? Or could it prohibit such use and enjoyment of the capitol and its grounds to a citizen of another State as it gave to all of the citizens of the State? If it held public lands, could it open them to purchase on the part of all its own citizens and deny the right of purchase to the citizens of other States? The constitutional provision reaches not only matters incorporeal, but the use and enjoyment of tangible property. There is just as much reason for the one as the other. Discrimination in the one case is just as odious as in the other. There is just as much mischief in the exclusion of citizens of other States from the use and enjoyment of that tangible property of the State which is common to all the people of the State by virtue of their citizenship, as in their exclusion from the common political and incorporeal privileges of the home citizens. And if Virginia could not exclude citizens of other States from the privileges accorded to all of her own citizens, so far as the use and enjoyment of her public buildings and grounds are concerned, a fortiori she could not exclude them from the privileges that belong to all of her citizens in the beds of her navigable streams, which are held by a tenure far more indefeasable, so far as the rights of the people of the State are concerned, than that of her capitol and grounds.

A person who plants oysters in navigable rivers and afterwards takes them up, uses the public property of the State—that is, the beds of those rivers—in a way not at all different from his use of the public

grounds when he enters the same and walks through them, by putting down his foot and then taking it up. It may be that the State could exclude all from this use, but if the grounds are open to the citizen they cannot be shut against the citizens of other States. There is no more an appropriation of the State's property in one of these cases than in the other. It is only a use in both cases of the soil of the State, devoted to public purposes. Moreover, it may be properly said that where public property can only be used by appropriating it, as is the case with respect to oysters taken from the bed of navigable rivers, if the appropriation is prohibited, the use is altogether denied. So that the law which prohibits a non-resident from taking is in substance and legal effect a *denial of a use* which is granted to citizens.

The rights of the home and foreign citizen in the three different species of State property respectively, to which we have referred, are substantially the same. As to the first (what may be called the private property of the State—such as its stock, money and funds), neither the home or the foreign citizen has any right of user or appropriation. As to the second (such as its public buildings and grounds), there is a right of user, but not of appropriation, both by home and foreign citizen. As to the third class (such as its rivers and fish that thrive therein), there is the right of appropriation both by the home and foreign citizen. How fallacious is the reasoning which draws the deduction that the foreign citizen cannot appropriate the fish in the public streams because he cannot appropriate the stock or funds of the Commonwealth! How fallacious the conclusion that the foreign citizen cannot appropriate oysters because he cannot appropriate the public grounds! The answer is, that where the home citizen is excluded, so is the foreign citizen; where the home citizen can use, the foreign citizen can use; where the home citizen can appropriate, the foreign citizen can do the same. The true test is, what can the home citizen do in the like case, and not what the foreign citizen cannot do in a different case. It will not do to show that a foreign citizen has not the right to use or appropriate what for convenience may be called the *private* property of the State, and then conclude from such premise that he cannot use or appropriate the *public* property of the State. We repeat, the true test is, what are the rights of the home citizen in the particular case? These vary according to the nature of the property; but whatever the rights of user or appropriation which spring from citizenship may be, they are common to both classes.

Judge Washington concluded his opinion by saying that "the oyster

beds belonging to a State may be abundantly sufficient for the use of that State, but might be totally exhausted or destroyed if the Legislature could not so regulate the use of them as to exclude the citizens of the other States from taking them, except under such limitations and restrictions as the law may prescribe." We beg leave to remark that this objection cannot apply to this case. McCready did not propose to take any oysters away and thereby diminish the source of supply, but to plant them—to deposit them where there were none. Nobody contests his right to the oysters which he had in hand. They had been obtained by him in accordance with the laws of this State and the United States, and his right to them was perfect, complete and conclusive. He proposed to add to the store, and not to exhaust. The record in this case does not raise the question whether McCready would have had the right to take up the oysters which he had planted. If he should hereafter make any such attempt, that might or might not be an offence under another clause of the act, which the State might or might not have the right to enforce. We do not believe the State would have any right to prevent him. But we say again, that point is not in this case. The only question involved, is the right to plant. That may exist, while McCready might not have any right to remove after he had planted. It might be, though we do not for a moment believe it, that as long as such right was given to the home citizen, McCready had no right to use the bed of the river for the purpose of fattening his oysters, and that such use would forfeit the oysters which he had planted, just as a structure on another man's land becomes his property, but even if all this is so, it does not affect the right to plant. See 1st Pennington, 284.

Judge Washington in this last quotation speaks of regulating the use of the oyster beds "so as to exclude the citizens of other States from taking them, except under such limitations and restrictions as the laws may prescribe." So it seems that Judge Washington himself was not prepared to stand a total prohibition. The law of New Jersey, which he defended, did allow non-residents to catch oysters just as freely as citizens except from a vessel; and non-residents could catch from a vessel if it was wholly owned by a resident. The object of the law seems not to have been to prohibit non-residents from catching oysters, but to have been a police regulation, like that in Baker vs. Wise, decided in this court, for the purpose of securing a home responsibility in the event of a failure to comply with the fishery regulations as to the time of fishing and the instruments which could be lawfully used. We

do not wish to be understood for one moment as denying the right of the State to regulate fisheries or oyster taking. We admit that right in its amplest form, as well as the police authority of the State. If the planting of oysters obstructed navigation, or was injurious to the health or morals or safety of the public, it could be prohibited. But then the prohibition must extend to all, and an omission to extend the prohibition to all is proof that the regulation was a pretence. An alleged regulation, which is a prohibition to non-residents and at the same time a license to residents, is no regulation of the use at all. It is a misnomer so to denominate it. It carries on its face a different purpose. Judge Washington seems to have felt the force of this view, and therefore he qualified his phrase about regulating the use so as to exclude by adding, "except under such limitations and restrictions as the laws may prescribe."

Judge Baldwin, in Bennett vs. Boggs, 1 Baldwin's C. C. R., p. 65, approves of the principles announced by Judge Washington in Corfield vs. Coryell. But this approval is mere obiter. The controversy in Bennett vs. Boggs did not involve the constitutional provision at all, as it was a question entirely between residents of the same State.

The attorney-general in his brief cites Hanly vs. Compton, 7 Vroom, 507. That was a case of taking and not planting. The court puts its decision upon the ground that the foreign citizen had no right to the property of the State, and especially to subvert the beds of the navigable waters of New Jersey. Moreover, the New Jersey law prohibited both residents and non-residents alike from taking oysters except by resident hands and vessels owned by residents, and therefore the action of the law was equal.

We have thus, we trust with becoming diffidence, examined the grounds upon which Judge Washington based his conclusions, so far as he has given them, and we confidently appeal to this court to determine, first, whether his decision is any authority at all in this case, and secondly, whether, even in a case for taking or catching oysters, his conclusions are founded in reason.

A word or two more and we are done with this branch of the case. If the United States were to cede to Nevada or California, for the benefit of their citizens, the public lands within those States respectively, would those States have the power to exclude the citizens of other States from digging their golden and silver ores? Or, without any cession, could the United States exclude citizens of Virginia or any other State from equal privileges in any of the public lands, and justify

such exclusion on the ground of its being a regulation in respect to those lands? The waters of Maine and Pennsylvania above tide are used for the purpose of transporting logs and lumber. Can a Virginian be excluded from that privilege if it is given to the citizens of those States? Can a Virginian be forbidden from angling in the Hudson or from hunting in the northern wildernesses of the Empire State, if a New Yorker by virtue of his citizenship can do those things? Or more to the case in hand, if the riparian owners on the Hudson are allowed by law to build wharves and piers on that river and thus occupy a portion of its bed, could that right be denied to a Virginian resident ~~born~~ in Virginia but owning property fronting on that river? Yet if the pretention of the Commonwealth be true, all these things can rightfully happen.

The constitutional provision refers not only to privileges but "immunities." The primary meaning of the last word is freedom from punishment. The phrase means that the foreign citizen shall not only be entitled to all the privileges that flow from citizenship, but that he shall not be punished if the home citizen in like condition is not punishable. If there be a doubt as to the scope of the word "privileges" there can be none as to "immunities." If the State cannot in the like case or for the same so-called offence inflict fine or imprisonment or stripes upon its own citizens, it cannot upon the foreign citizen. Can a State make any act to be a trespass or a larceny on the part of a citizen of another State if the same is neither trespass or larceny if done by one its own citizens? Especially, can a State declare that a certain act, when done upon its public property, shall be an offence if done by a foreign citizen but no offence if done by one or all of its own citizens? If so, is not the Federal provision completely nullified? If the provision does not meet such a case as that what does it mean? What is its force and effect? Even in the case of the State's mere private property, is it not more than doubtful whether a State could declare that a certain act would be deemed to be larceny if done by a citizen of another State but not larceny if done by any one of its own citizens? And a fortiori as to its public property. Was not the constitutional provision intended to meet just such cases as these when it secured the "immunities" of the home citizen to the foreign citizen? It does not meet the case to say that the home citizen is not punished because he is only using his own property when he plants in the beds of navigable streams. The constitutional provision is designed to meet that very case; because it subrogates the foreign citizen to the immunities that

belong to the home citizen *in every case* where the home citizen can claim the immunity by virtue of his citizenship. If the beds of the navigable streams belong to the home citizens, it is only so because of their citizenship, and as to all such rights, whether they appertain to tangible property or incorporeal privileges, the immunity of the home citizen is the immunity of the foreign citizen. There might be some force in the argument if each citizen of Virginia owned in his own private right his proportion of the beds of the navigable waters of the State. But such is not the case. He, along with his fellow citizens, has the right of user of this public property by virtue of his citizenship, and this is the full extent of his right. The *jus privatum* is in the State—the *jus publicum* in the citizens.

In the interpretation of the word "immunity," we cannot be troubled with dsitinctions between what are fundamental immunities and what are not fundamental. It means exemption from any punishment whatever, which cannot be lawfully inflicted on the home citizen. Jurists have disputed as to the scope of the privileges secured by the constitutional enactment, but there cannot be much controversy as to the meaning of immunity. No one has ever denied that it meant an exemption from any punishment which could not, under the same conditions of fact, be inflicted upon the home citizens. Our fathers had a purpose in using both words. They intended to meet the case both of favor and disability—to provide that the foreign citizen should not only have the benefits which belonged to the home citizen by virtue of his citizenship, but that he should not be subjected to any punishment which was not common also to the home citizen. One part of the clause is affirmative, the other is negative; and it required both to give to the citizens of all the States the protection which it was intended they should have the right to claim.

If it be asked whether if the oyster beds of the State are sufficient to supply its own citizens, but not sufficient to supply the citizens of all the States, the State is obliged by force of the constitutional provision to submit to the destruction of its property, we reply no. First, we say that such an objection does not apply to the planting of oysters; secondly, it is competent for the State to prohibit the taking of oysters at certain periods of the year, to forbid their being gathered with destructive implements, to prohibit the taking of more than a limited quantity and in fact in every way by equal laws to conserve their property by any regulations that are within their police power and not obnoxious to the Federal constitution. But if the right thus limited and regulated

is given to all citizens of Virginia, it enures with the same limitations to the citizens of all the States. Whether the State by virtue of its control over the beds of its navigable rivers, can exclude a portion of its citizens and limit the right of taking oysters to tax payers and those who have resided permanently for a certain length of time in the State, is a question not raised by this record. Perhaps it can, and in this way preserve the oysters to this class of her people. In the law of April 18th, 1874, the Legislature, to a certain extent, seems to have acted on this view and reserved certain oyster rights to tax payers and those who have resided in the State for twelve months. The 43d section of the act declares that where the word "resident" is used in the law, it shall apply only to tax payers and those who have resided a year in the State. But this limitation does not apply to the phraseology of the section under which this indictment is framed, where the word used is not resident, but "person" and "citizen." The right to plant is not limited to tax payers and residents, but is open to all the citizens of the State. The right of tonging and dredging is limited to tax payers, and residents of a year's standing. The right to plant oysters belongs to every citizen of the State, whether tax payer or not. Even if the statute was silent, it would belong to him under the common law. But as to planting there is entire conformity between the common and statute law; and every citizen, whether tax payer or not, and whether he has been a resident twelve months or not, can claim his right to plant under both the common and statute law.

In conclusion of this branch of the case, we hold that the following propositions have been established:

1. That the State, both at common law and by its own statutes, holds the beds of its navigable rivers in trust for the common benefit of all its people or citizens.

2. That being so held, the rights of the citizens of Virginia, by force of the Federal constitution, enure to the benefit of the citizens of other States, even against a limitation in the State statute. Such limitation is void, because in derogation of Virginia's compact found in the supreme law. The constitution acts upon the grant contained in the State law in favor of the citizens of Virginia, and securing the same benefit to citizens of other States, nullifies the limitation in the State law.

3. That the State can fully and effectually regulate the use of its fisheries, and apply its police power to their government and management; but that all such regulations must be in subordination to the

provisions of the Federal constitution, and must be made to apply to its own citizens as well as the citizens of other States.

4. That the law as to shell fish, so far as the right to use or appropriate them is concerned, is the same in every respect as that which applies to floating fish.

5. That the right to plant oysters is distinct from the right to take and catch, and even if the constitutional provision does not secure the latter, it does secure the former to the citizens of other States, as no abstraction of any property held by the State is involved therein. Even if the right to plant included the right to take up (which we deny), there would be no abstraction or diminution of the property of the State, as the planter only takes up what he puts down.

6. That the State holds its different kinds of property in different rights. It has its private property as a private citizen has, which it can control as fully as the private citizen can his. It has its quasi public property, of which its citizens have the use and enjoyment, but which its own citizens cannot appropriate; such, for instance, as its public buildings and grounds, and as to which the citizens of other States have the same right of user and enjoyment, but not of appropriation. The State also holds a third class of property, such as its floating and imbedded fish, as to which there can be no use or enjoyment except in appropriation; and when the right of user by appropriation by the State law is given to its own citizens, the Federal constitution secures the same right of user by appropriation to the citizens of the other States. This is the only rlght of appropriation of State property which either the citizen of the State or the citizens of the other States can claim.

7. That the constitutional provision applies to tangible property as well as to incorporeal privileges, where the right to appropriate tangible property held by the State is conferred upon all its citizens.

8. That the doctrine for which we contend involves no denial of the absolute dominion and authority of the State over the oysters imbedded in her navigable rivers; but only maintains that after the State has exercised its dominion and authority over the same in the way in which she has done, to-wit, for the benefit of all her citizens, that then and in that case alone the supreme law secures the same benefit, by subrogation, to the citizens of other States. This case raises no question as to what would be the law if Virginia had not granted the right to all her citizens. The constitution does not require Virginia to do anything with her oyster beds; but only, if she does give the benefit of them to all of her own citizens, the same benefit enures to the citizens of other States.

9. That if the right of planting oysters is not secured by the word "privilege" in the Federal constitution, any punishment for planting them is certainly excluded by the word "immunity," so long as no punishment is inflicted upon the home citizens.

2. We have exhausted so much time in discussing the true meaning and scope of the constitutional provision relating to citizenship, that we will only very briefly allude to the commercial question. The law of Virginia applies as well to oysters brought from a sister State as to those bought in Virginia and planted here. As to such foreign oysters, this law is a regulation of commerce in conflict with the commercial regulations already enacted by Congress. It is in conflict with the laws of the United States relating to the coast trade, because those laws as to commerce between the States give to all citizens of the United States the same rights of traffic and intercourse. If the laws of Virginia recognise anything as property or as the subject of traffic and trade, then, under the commercial regulations of the United States, the citizens of other States have the same rights as to traffic and trade in respect to that property, if brought into Virginia, as the citizens of Virginia have in relation to domestic property of the same kind. If the Virginian can sell, or buy, or store, or use, the citizens of any other State may. Whatever prevents him is a commercial regulation in conflict with the regulations of Congress already enacted. The foreign sitizen is subject to the same limitations as attach to the Virginian in the use of that property for the purposes of traffic—such as inspection, quarantine, health regulations and the like—but to none others. Without further comment on this branch, we refer the court to Cooley's edition of Story's Commentaries on the Constitution, vol. 2, from pages 2 to 23.

Since writing the foregoing, we have seen the brief of the Attorney General. There is no substantial difference between us as to the principles which should govern the case, so far as the rights of Virginia and of her citizens to the beds of her navigable rivers are concerned. We do differ as to the true meaning and scope of the Federal provision, and as to that only.

OULD & CARRINGTON.

January 18th, 1878.

Robt. Ould

IN THE SUPREME COURT OF THE UNITED STATES.

JAMES W. McCREADY, Plaintiff in error,

v.

THE COMMONWEALTH OF VIRGINIA, Defendant in error.

BRIEF FOR DEFENDANT.

IN THE SUPREME COURT OF THE UNITED STATES.

JAMES W. McCREADY, Plaintiff in error,

v.

THE COMMONWEALTH OF VIRGINIA, Defendant in error.

BRIEF FOR DEFENDANT.

The nature of the claim of Virginia to exclude all but her own people from the use of the oyster fisheries in the bays, rivers, and creeks within her jurisdiction, is expressed in the section of her act of April 19, 1874, quoted in the plaintiff's brief. Rightly understood, it declares that the beds of her bays, rivers, and creeks within her jurisdiction, shall continue and remain the *property* of the commonwealth, that is to say, of the people, who are the commonwealth; the declaration, therefore, that they "may be used as a common by all the people, for the purpose of fishing and fowling, and of taking and catching oysters and other shell-fish, subject to the reservations and restrictions hereinafter imposed," imparts no new right of property in them, but only suggests the regulations under which the common property, in one particular only, shall be used and enjoyed. Accordingly, the provisions which follow, relate to the public revenue to be derived from these fisheries—their use by individuals, the improvement of the fish, the traffic in them,

and their protection from exhaustion and waste by those who have no property interest in them.

It is asserted on the other hand, that "Virginia, both at common law and under her own statute, holds the beds of its navigable waters in trust for the common benefit of all its people or citizens;" that this beneficiary right of the people—at least of planting, if not of catching oysters (between which a distinction is supposed to exist)—is but a "privilege" or "immunity," "of which there can be no enjoyment but by appropriation by the State, and that when the right of user is given by the State to its own citizens, the federal constitution extends the same right of user to all the citizens of the United States. From which it would result, that the State, though only a trustee, may grant or withhold the enjoyment of the subject of the trust by the beneficiary; and that so soon as such enjoyment is permitted, the right of enjoyment passes beyond the beneficiary to all the people of the United States.

If this doctrine be supported, it will be attended with consequences both novel and disastrous, not to Virginia only, but to all the States on the Atlantic border—all of which have oyster fisheries and other fisheries within their limits. These States will abandon the care of interests in which they find they have no separate and exclusive right, and the whole property will soon be exhausted and destroyed by such a promiscuous and common use of it as will inevitably ensue.

But this reasoning springs from a total misconception of the nature of the right of the States in their navigable waters. Subject to the grants of power in the federal constitution, there is a vested common property in the people of the States, respectively, in the navigable waters within their limits, and the beds and shores which support them. Qualified, as just stated, their use of them for all beneficial purposes, such as passing and repassing, sustenance, fishing, fowling, bathing, and all other uses of the water and its products, may be regulated by their representatives, but the *propriety* right remains in them. By the fundamental laws of the States, they are not the subject of grant, and make no part of their land systems.

The nature of the right may be considered, first, as it existed in the colonial period; second, as affected by the independence of the States; third, by the provisions of the constitution of the United States.

1. In the colonial period. These positions are firmly established: that the right of discovery is the foundation of all the titles to territory on the American continent, as between the different nations who made settlements here, the discovery being for the benefit of the whole nation to which the explorers belonged, and by whose authority and under whose protection, the discovery is supposed to have been made; that the English settlers, both upon principles proper to such right, and by explicit grants in their charters, brought with them the English common law, so far as applicable to their situation, a part of which established here was, that the King, as head of the nation, held, and by his deputies granted, all vacant soil; but as to the bays, rivers and navigable waters, they were *jura regalia*, prerogative rights, inseparable from the powers of government and not the subject of grant. They were held by him permanently for the common use and enjoyment of the people of the colonies, respectively. Johnson *v.* McIntosh, 8 Wheat., 595; Arnold *v.* Mundy, 1 Halsted (N. J. Law), 1; Martin *v.* Waddell, 16 Peters, 367. Whether they were beyond the power of Parliament, was never discussed; but it seems that in England, by an act of that body, even a navigable river may be extinguished. Angell on Tidewaters, ch. 4, p. 85, cites Rex *v.* Montague, 4 B. & Cres., 598.

2. When American independence was established, there devolved upon the States the full powers of sovereignty, not as successors to the kingly authority, but by the achievement of successful war. Indeed, Virginia, in her first constitution (June 12, 1776), in defining the powers to be exercised by the "Governor or Chief Magistrate," was careful to declare, "that he shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England;" and "that all power is vested in the people; that magistrates are their trustees and servants, and at all times amenable to them." In Rhode Island *v.* Massachusetts (~~5~~ Peters ~~528~~), this court describes this newly-acquired authority as combining "the prerogative of the Crown and the transcendent power of Parliament, in a plenitude unimpaired by any act, and controllable by no authority." In Martin *v.* Waddell, p. 114, the court, after noticing some division of opinion among English lawyers on the power of the Crown, since *magna charta*, to create exclusive rights of fishery in navigable waters, says: "And we more willingly forbear to express an opinion on this subject, because it has ceased to

be a matter of much interest in the United States. For when the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority" (in the soil of their navigable waters) "must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British Crown, where the title is held by a single individual in trust for the whole nation." And this doctrine is as applicable to the new as to the original States. Pollard's lessee *v.* Hagan, 3 How., 212. Instances of the exercise of this power by the States, after their independence and before the adoption of the Constitution, occur in the compact between Maryland and Virginia for the regulation of the navigation and fisheries of the river Potomac (1 Revised Code of Virginia, 1819, c. 18, p. 83), and between Pennsylvania and New Jersey, as to the river Delaware. Bennett *v.* Boggs, 1 Bald. Cir. Co. R., p. 60.

3. The grants in the Constitution of the privileges and immunities of the citizens of each State to the citizens of the several States, and the power of Congress to regulate commerce among the several States.

1. "Privileges and immunities." It is clear, that if these words be tested by their popular use, or even the many senses in which they occur in legal language, it would be impossible to give them any determinate meaning in the Constitution. In dictionaries, they are explained to be synonymous, or nearly so; though in one which is widely received, they are illustrated by instances which give them, in some cases, a distinctive meaning. Webster (verb *privilege*) gives an instance from *Kettlewell* which makes *privilege* mean a right to equality of dispensation in proceedings against crime: "When the chief captain ordered him to be scourged, uncondemned, he pleads the legal *privilege* of a Roman, who ought not to be treated so." And from W. Taylor: "*Privilege* consists of positive advantages; pre-emption and *immunity* of those which are negative; but *privilege*, in its most extensive sense, comprehends all the rest, *privilege* of the nobility, of officers, of a member of Congress, of *citizens*, prerogative of birth, of a sovereign, of a president, of a parent; exemption from military duty, from taxes; *immunity* from labor or service, &c." It is apparent that in none of these explanations is the idea of a property-right conveyed.

But in this, as in other constitutional discussions, it is of use to consider the subject historically. The Articles of Confederation employ these words, "privileges and immunities," for the first time in our political nomenclature, and it is not perceived that they have since been used in any legal sense other than is there expressed. Article 4, section 1, provides: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; provided, also, that no impositions, duties or restrictions shall be laid by any State on the property of the United States, or either of them." 1 Hening's Statutes at Large, p. 37. No idea of a property-right is here conveyed, but strictly of personal rights only—*jura personarum*—such as belong to citizenship. So numerous are these, though consistent in their general character, that it is thought safer to leave their meaning to be determined in each case, in view of the particular rights asserted therein, than to attempt to define them all in advance. Conner *v.* Elliott, 18 How. (U. 5), 591; Ward *v.* Maryland, 12 Wall., 430. For illustration of the subject, see Corfield *v.* Coryell, 4 Wash. C. C. R., 371, where the right of a State to exclude non-residents from her fisheries, is maintained; and it is said, these privileges and immunities mentioned in the Constitution are "*fundamental*, and such as belong of right to the citizens of all free governments." "But we cannot accede to the proposition, that under this provision of the Constitution, the citizens of the several States are permitted to participate in all the *rights* which belong exclusively to the citizens of any other State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such States, the Legislature is bound to extend to the citizens of all other States the same advantages as are extended to their own citizens." See Cooley on Constitutional Limitations, 397. Ward *v.* State of Maryland, *sup.*; Paul *v.* Virginia,

8 Wall., 180; Slaughter.house Cases, 10 Wall., 1; Haney & Scattergood *v.* Compton, 7 Vroom. (N. J.), 509; Murray *v.* McCarthy; 2 Munf. 493; Com. *v.* Towles, 5 Leigh, 743 (Va.)

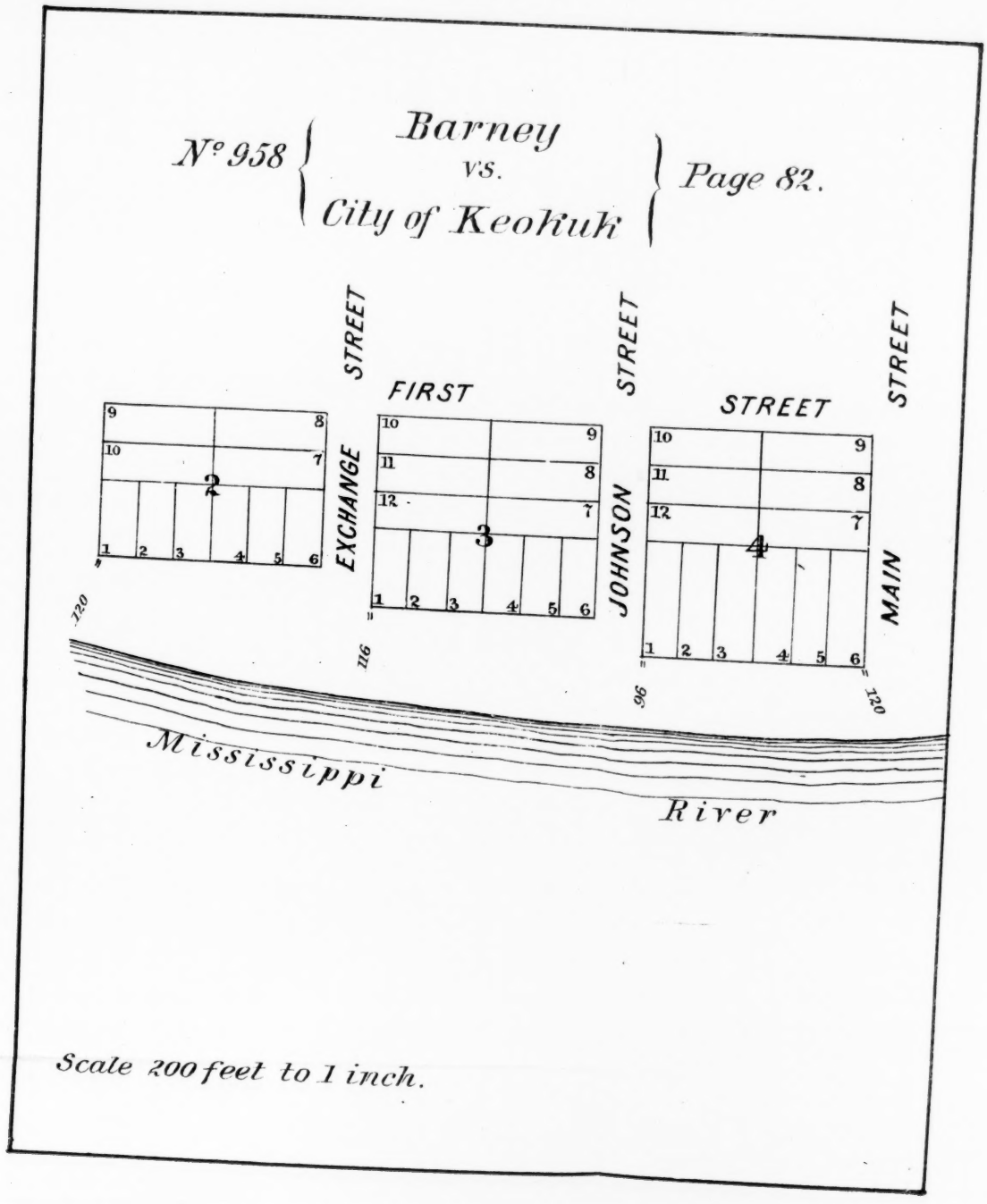
But it is inconceivable, that a right so important as this—a flower of sovereignty—should have been surrendered by expressions so slight and inappropriate for the purpose as these, and without protest, or even discussion; for they seem to have been introduced into the Constitution in their present succinct form almost without observation, so far as can be gathered from the writings and debates of the time; and equally strange, that the States should ever since have exercised, almost unquestioned, full power and control over the fisheries in the waters within their limits. Madison Papers, 2 v., 1226; 3 v., 1447. The conclusion is inevitable, that the original power of the States in this matter, qualified by the Constitution, remains unimpaired. Angell on Tidewaters, 144–5. For the law of Pennsylvania, *Id.*, pp. 145, 150, and 153. Massachusetts, pp. 150, 154, 191. Maine, 154, 155. Connecticut, 155, 156. Laws of New Jersey, Nixon's Digest, 109. Maryland General Laws (1860), ch. 71. Dorsey's Laws (1840), ch. 87. Virginia Revised Code (1819), ch. 255. Battail's Revisal, ch. 83, sec. 4. But such instances are too numerous for citation.

2. The grant of the power to regulate commerce among the States: It seems impossible for ingenuity to confound the commerce in oysters between the States on their navigable waters, after they have been taken and become an article of trade, which may be regulated like other commerce, by Congress, and the act of taking them from their natural rocks, or planting them in the soil of bays and rivers. Corfield *v.* Coryell, *sup.* Smith *v.* State of Maryland, 18 How., 71.

There is no ground for a distinction such as is attempted, between "catching" and "planting" oysters. It there be any practical difference in these operations, it is in the greater control of the soil involved in imbedding them by planting. "Planting" has a statutory meaning, as "dredging" has, which was made an offence by an early statute in England. Planting is a recognized mode of improving oysters by depositing them separately in a favorable soil, after they have been taken from their natural state, to remain until they grow and fatten, for use or for market. In this condition they become the property of him who plants them lawfully, and are protected by the laws against larceny. Field *v.*

Hedgman, 14 Wend., 42, S. P. Lowndes *v.* Dickinson, 34 Barb., 4 *Id.*, 592. It is unimportant how the planter procured them, whether by taking them or obtaining them after they have been taken by others; his offence is the same, if he was at the time he planted them a non-resident of the State. But if any legal distinction exists in this respect, ground for it should have been shown in defence. The legal inference is, that the accused was convicted of the fact made criminal by the statute.

R. T. DANIEL.


No. 958
Barney
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City of Keokuk
Page 82.
STREET
FIRST
STREET
STREET
STREET
EXCHANGE
JOHNSON
MAIN
2
3
4
120
116
96
120
Mississippi
River
Scale 200 feet to 1 inch.

113

150 ft.

Block 3. | No 5 | No 6.

Hiram Barney

50 ft. | 50 ft. | 50 ft.

Plank Walk

66 ft.

Center Line of Johnson St.

150 ft.

Block 4.

No 1 | No 2 | No 3.

Plank Walk

50 ft. | 50 ft. | 50 ft.

Plank Walk.

Freight Track

50 ft.

18 ft.

203 ft.

Des Moines Valley Ware Houses

20 ft.

Scales 37 ft.

Keokuk & Des Moines Rail Road Track

R. R.

12

16½

Original River Bank as pr. Plat filed.

10

10

Miss. Valley Track

Plank Walk to Depo.

Miss. Valley Freight Track

23.

7.

28

Rail Road to Elevator

Rail Road

Coal Track.

33

220 ft from original Riv. Bank to ordinary high water mark.

100 ft.

50.

Packet Depo.

Ordinary High Water.

280 ft to high water – from front line of Johnson St.

Plat of a survey of Lot 5 & 6 Block No 3. showing the exact location of the Rail Roads Des Moines Valley Ware house Packet Depo. and other fixtures Also by the red line showing the original Bank of the Miss. River.

All of which I hereby certify are correctly shown upon this plat.

Keokuk September 13th 1874.

Oren Baldwin.
City Engineer.

Exhibit "D"

No 958. Barney vs. City of Keokuk et al Page 130.

Scale 30 Ft. pr. inch.

MISS. RIVER

MISS. RIVER